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## **Sergio Luis Ramirez Mendoza**

### **The crisis of civil-military relations in Mexico during the war against drugs: comparative reflections on accountability and legal reform in the modern democratic era**

This research is focused on the current crisis that is taking place between Mexico's civil society and the armed forces in the context of the "war against drugs". In 2006 the federal government initiated a security strategy focused on the militarization of the enforcement against organised criminal groups that specialise in drug-trafficking. At the same time the number of civilian complaints for human rights abuses attributed to military personnel increased exponentially. Ten years later, the same policies are in force and the soldiers keep being accused of severe human rights violations. The aim of this project is to develop a theoretical framework that will provide the elements needed to reform the current Mexican legal frameworks and military institutions, in order to improve the relationship between the armed forces and civil society. To develop new theory, this research addresses the social background of the conflict and analyses contemporary concepts and frameworks that shape the topic of civil-military relations both at a domestic and international level. Subsequently, the cases of the German post-WWII military institutional reforms and the emergency legal regime in Northern Ireland during the 1960s and 70s are studied and analysed. This provides the elements to do a legal comparison with the current Mexican legal codes and institutions. The result produces the theory needed to develop reforms that have the potential to shape a new civil-military relations paradigm in Mexico.

# **The crisis of civil-military relations in Mexico during the war against drugs: comparative reflections on accountability and legal reform in the modern democratic era**

**Sergio Luis Ramírez Mendoza**

A thesis presented for the degree of  
Doctor in Philosophy



Durham Law School  
University of Durham  
England

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## List of abbreviations

|        |   |
|--------|---|
| ECHR   | European Convention on Human Rights                       |
| ECtHR  | European Court of Human Rights                            |
| EHRR   | European Human Rights Reports                             |
| EPA    | Emergency Provisions Act                                  |
| HC     | House of Commons  |
| HL     | House of Lords  |
| IACHR  | Inter-American Commission on Human Rights                 |
| IACtHR | Inter-American Court of Human Rights                      |
| ICC    | International Criminal Court                              |
| ICCPR  | International Covenant on Civil and Political Rights      |
| ICJ    | International Court of Justice                            |
| ICTR   | International Criminal Tribunal for Rwanda                |
| ICTY   | International Criminal Tribunal for the former Yugoslavia |
| OAS    | Organization of American States                           |
| PTA    | Prevention of Terrorism Act                               |
| SCSL   | Special Court for Sierra Leone                            |
| UN     | United Nations  |
| UNCAT  | United Nations Committee Against Torture                  |
| UNCHR  | United Nations Commission on Human rights                 |
| UNCRC  | United Nations Convention on the Rights of the Child      |
| UNGA   | United Nations General Assembly                           |
| UNHRC  | United Nations Human rights Council                       |
| UNSC   | United Nations Security Council                           |
| WLR    | Weekly Law Reports  |

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# Introduction

## Setting the social context of this research

The armed forces are currently on the streets of Mexico performing security tasks against organised crime groups. Their duties consist in establishing checkpoints, chasing and confronting criminal groups that produce, transport and sell drugs both to the United States of America and Mexico's own territory, and uses this country as a corridor for other Latin American States. Therefore, a central part of the global "war against drugs" security strategy<sup>1</sup> is the physical confrontation with organised crime,<sup>2</sup> which in Mexico adopts the modality of *drug cartels*. In order to confront this threat, ex-president Felipe Calderon took a unilateral decision and indefinitely deployed the armed forces inside the country during his administration (2006-2012), as the legislative and judicial powers (the other two powers of the Mexican State) were not consulted. The current Peña Nieto administration (2012-2018) has not applied any changes on the security policies. At the same time that the army has been deployed on the streets, an alarming rise of complaints for human rights abuses has occurred. Violent crimes have escalated and neither the civilian security forces nor the armed forces have shown any efficient strategies for counter-attacking the powerful organised criminal groups. If the army's presence can be expected to last several more years in Mexican territory, the most coherent decision would be to regulate its performance.

As the Federal Congress was not consulted to deploy the military on domestic territory, no set of public policies that would regulate the army's actions was legislated, because the official announcement was only done through a press conference.<sup>3</sup> The way in which events have developed clearly shows how the

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<sup>1</sup> Transform Drug Policy Foundation, "The War on Drugs: Undermining Human Rights" (*Count the Costs: 50 Years of the War on Drugs* 2011) <[http://www.countthecosts.org/sites/default/files/Human\\_rights\\_briefing.pdf](http://www.countthecosts.org/sites/default/files/Human_rights_briefing.pdf)> Accessed 26 December 2016

<sup>2</sup> S Peltzman, G Fiorentini, *The economics of organised crime* (Cambridge University Press, New York 1995) 3

<sup>3</sup> Official Residence, "Announcement of the Michoacán Joint Operation" (*Presidency of the Republic* 11 December 2006) <<http://calderon.presidencia.gob.mx/2006/12/anuncio-sobre-la-operacion-conjunta-michoacan/>> accessed 7 May 2016 (All translations on this research made by the author, except where stated). In this announcement, the Calderon administration uses the terms *organised crime* and *drug cartels* interchangeably, so this research uses both terms, which refer to the same groups.

absence of a legal and well defined framework has caused a broad conflict in the relationship between Mexican society and military personnel. It seems that both the government and the National Defence Secretary (the official name of the military institution) are determined to carry on indefinitely with the same policy.

Human Rights Watch (HRW) issued a report that detailed the relationship between the army and Mexican citizens previously to the current security strategy, and included a section dedicated to analysing the situation in 2007 and 2008 after the military operatives against organised crime groups started.<sup>4</sup> Access to details and information about human rights violations is very limited; Amnesty International (AI) has established the military's reluctance to share information about the cases<sup>5</sup> in which military personnel was involved; the Defence Secretary never gave them any of the information requested.<sup>6</sup> Between 2007 and 2008 HRW documented various cases of abuse which involved civilians who had no connections to any drug cartel; these cases involved more than 65 persons altogether. The acts committed against civilians include torture, rape, manslaughter, enforced disappearance, illegal detention, robberies, illegal break-ins in private spaces, threatening and sleep deprivation, among others.

Although The National Defence Secretary's has issued a human rights framework for the military and aerial force, this policy has not had any impact on the number of human rights abuses. To put an example, HRW documented the testimony of an under-18 girl who was forced into a helicopter and consequently raped and threatened. She stated that a soldier told her "human rights don't exist, we will throw you in the sea and you will be food for the sharks".<sup>7</sup> This illustrates the current culture prevailing within the soldiers, where basic human rights are not taken

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<sup>4</sup> "Uniform Impunity – Mexico's Misuse of Military Justice to Prosecute Abuses in Counternarcotic and Public Security Operations" (*Human Rights Watch* 2009) 22-3  
<[http://www.hrw.org/sites/default/files/reports/mexico0409web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/mexico0409web_0.pdf)> accessed 15 April 2011

<sup>5</sup> Amnesty International, *Mexico – New reports of human rights violations at the hands of the army* (Editorial Amnistía Internacional, Madrid 2009) 18

<sup>6</sup> Human Rights Watch (n 4) 20

<sup>7</sup> *ibid* 39

into account, as this case is not an isolated event, but is part of a pattern<sup>8</sup> which has been a constant on par with the indefinite deployment of the armed forces.

The current problem found by HRW is the impunity that lies in military courts, as they concluded that the necessary standard of independence which is required to carry out a proper investigation does not exist when the military prosecute their personnel in military courts.<sup>9</sup> Although this position changed recently, and now military personnel can be judged in civilian courts for cases of human rights abuse (this reform is analysed in this research), there is still no legal support that will regulate their actions in order to prevent these types of abuses.

Since the first months of the start of the current governmental, a series of events have taken the spotlight, attracting both the national and international public opinion; such incidents have also caught the Human rights defenders attention. Human rights organizations had problems to gather most of the information about abuse by the armed forces. For one part, the secrecy towards investigations about their personnel makes this task highly complicated. On the other hand, most of the victims are too intimidated to talk about it and most of them never make an official complaint. A civil organization located in the state of Nuevo Leon received 70 complaints against the army that detailed torture and other issues but only 21 of them actually made an official complain.<sup>10</sup> In fact, the Mexican government was reluctant to release information concerning drug-related violence, even the Trans-Border Institute had to obtain a lot of data from *Reforma* newspaper, because there was a lack of general information from the official institutions<sup>11</sup>. The low number of official complaints can be understood when there is evidence of the authorities failing to conduct proper investigations of alleged killings, which include

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<sup>8</sup> "Mexico's Disappeared: The enduring Cost of a Crisis Ignored" (*Human Rights Watch* 2013) <[https://www.hrw.org/sites/default/files/reports/mexico0409web\\_0.pdf](https://www.hrw.org/sites/default/files/reports/mexico0409web_0.pdf)> accessed 5 April 2016

<sup>9</sup> Human Rights Watch (n 4) 16-17

<sup>10</sup> Amnesty International, "New informs about human rights violations at the hand of the army", (*Amnesty International*) 8-9 <<http://www.amnesty.org/en/library>> accessed 8 September 2011

<sup>11</sup> V. Ríos, D. Shirk, "Drug Violence in Mexico: Data and Analysis Through 2010", (*Justice in Mexico* 2011) p. 4. <<http://justiceinmexico.files.wordpress.com/2011/02/2011-tbi-drugviolence4.pdf>> accessed 9 March 2011

manipulation of evidence, lack of forensic expertise and institutional independence.<sup>12</sup>

To show the severity of the current security situation in Mexico, the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein declared on the 7<sup>th</sup> October 2015 the following, after his visit to Mexico:

For a country that is not engaged in a conflict, the estimated figures are simply staggering: 151,233 people killed between December 2006 and August 2015, including thousands of transiting migrants. At least 26,000 people missing, many believed to be as a result of enforced disappearances, since 2007. Thousands of women and girls are sexually assaulted, or become victims of the crime of femicide. And hardly anyone is convicted for the above crimes. Part of the violence can be laid at the door of the country's powerful and ruthless organized crime groups, which have been making life a misery for people living in several of Mexico's 32 States. I condemn their actions unreservedly. But many enforced disappearances, acts of torture and extra-judicial killings are alleged to have been carried out by federal, state and municipal authorities, including the police and some segments of the army, either acting in their own interests or in collusion with organized criminal groups.<sup>13</sup>

Commissioner Al Hussein does not justify what makes him establish that there is no armed conflict in Mexico, nor does he refer to any study or data at all. Chapter II analyses the current security conflict in Mexico with the requirements of International Humanitarian Law to establish if an internal armed conflict is taking place in Mexico. Regardless of the existence of such a conflict, it should be established that this thesis' goal is to establish mechanisms that would improve civil-military relations in Mexico, as sectors of the armed forces, as the commissioner himself states, have been committing gross human rights violations.

### **The army's position on the accusations against them**

The military commands have shown high concern about the absence of a legal framework that would regulate their actions. On September 15<sup>th</sup> of 2011, National Defence Secretary Guillermo Galvan Galvan expressed the armed forces' point of view on the murder and assault of innocent citizens in the war against

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<sup>12</sup> United Nations General Assembly "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions in follow-up to his mission to Mexico" (6 May 2016) 32<sup>nd</sup> session (A/HRC/32/39/Add.2), paras 23-32

<sup>13</sup> Office of the High Commissioner for Human Rights, "Statement of the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, on his visit to Mexico, October 7th, 2015" (*United Nations Human Rights*)  
<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16578&LangID=E>> accessed 8 October 2015

organised crime, but he also spoke in behalf of the soldiers' feelings. "We bemoan it with the same intensity that we grieve our fallen soldiers, their widows and their orphans. We are sensible to mourn as well as the everlasting bed of the crippled soldier."<sup>14</sup> Galvan Galvan addressed the urgency of creating a legal framework that regulates the armed forces partake in public security tasks and referred to the National Security Law which is being discussed in the Federal Congress at this moment

If this extends (the absence of a regulation), confusion and uncertainty among commanders and troops and even between society can be generated.....the National Security Law will, without a doubt, help to maintain the armed forces high moral and solid body spirit.<sup>15</sup>

## **The numbers from the Mexican Human Rights National Committee**

These are the recommendations that the Human Rights National Committee in Mexico has issued to the National Defence Secretary and the Navy in the last ten years. It should be addressed that the governmental security strategy started in the last days of December of 2006, but the purpose of including data from 2002 onwards is to show a correlation between the start of the military operatives and the raise in complaints against the armed forces (data taken from the Mexican Human Rights National Committee website<sup>16</sup>):

|      |    |
|------|----|
| 2002 | 0  |
| 2003 | 3  |
| 2004 | 4  |
| 2005 | 4  |
| 2006 | 1  |
| 2007 | 7  |
| 2008 | 16 |

<sup>14</sup> I. Alzaga, "Deaths of soldiers and civilians do hurt" (*Milenio* 2011)  
<<http://www.milenio.com/cdb/doc/impreso/9026650>> accessed 19 September 2011

<sup>15</sup> J. Aranda, C. Herrera, "It is urgent to clean up military duties in security tasks, says SEDENA" (*La Jornada*, 15 September 2011)  
<<http://www.jornada.unam.mx/2011/09/15/politica/002n1pol>> accessed 16 September 2011

<sup>16</sup> "Recommendations from 1990 to 2015" (*Mexican Human Rights National Commission*)  
<<http://www.cndh.org.mx/node/32>> accessed 8 May 2016

|      |    |
|------|----|
| 2009 | 31 |
| 2010 | 28 |
| 2011 | 29 |
| 2012 | 21 |
| 2013 | 9  |
| 2014 | 1  |
| 2015 | 1  |

It can be seen that the number of complaints for human rights abuses that involved members of the armed forces rose at the same time that these were deployed as part of Felipe Calderón's security strategy. We can only imagine how many real cases of abuse have taken place, being that Mexican society does not have a denouncement culture (recent studies have shown that 67.3% of all offenses don't get denounced<sup>17</sup>). While the latest reports about human rights abuses by the army have been putting them on the centre of controversy in the last years and reports about the increase in their brutality have been established,<sup>18</sup> the National Defence Secretary website states that the number of complaints against the armed forces has significantly dropped from 1574 in 2011 to 570 in 2014.<sup>19</sup> The secretary goes even further and establishes that the Human Rights National Commission has issued only four recommendations between 1 December 2012 to 14 May 2015, and states that such recommendations were issued for complaints that were started before 1 December 2012,<sup>20</sup> the day before current president Enrique Peña Nieto took office.

### **A better understanding between two separate visions**

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<sup>17</sup> L. Vargas Casillas, S. García Ramírez, *Legislative Projects and Other Criminal Themes* (Instituto de Investigaciones Jurídicas UNAM, Mexico City 2003) 178

<sup>18</sup> J.M. Vivanco, "Letter to Mexico's Attorney General on Human Rights Crisis" (*Human Rights Watch*, 28 April 2015) <<https://www.hrw.org/news/2015/04/28/letter-mexicos-attorney-general-human-rights-crisis>> accessed 7 August 2015

<sup>19</sup> "Complaints and Recommendations situation" (*Secretaría de la Defensa Nacional*) <<http://www.sedena.gob.mx/images/stories/D.H/2015/situacionquejasyrecomendaciones.pdf>> accessed 7 August 2015

<sup>20</sup> *ibid*



It is essential to find mechanisms that can create a better coexistence between the armed forces and security. Mexico cannot wait for its political leaders to reform the security policy; violence is escalating and academics have even catalogued the army's actions against civilians as "summary executions."<sup>21</sup>

Taking the soldiers back to their headquarters seems almost impossible; the level of violence generated by organised crime groups and the corruption inside the civil security forces makes the return of the armed forces an unlikely decision. Therefore, finding answers that improve civil-military relations is fundamental; these should be based on concepts that will be able to conciliate both sides' interests. These solutions should manage to create a democratic and respectful relationship between military personnel and civilians, as the ultimate goal should be generating a sense of union and cooperation towards the main goal which is restoring peace and wellness in Mexico's streets. The following research attempts to lay the groundwork for new theoretical reforms that will provide the federal congress with the required knowledge to archive this.

## **Research questions**

*What kind of structures and mechanisms can be developed to solve the current crisis regarding civil-military relations in Mexico?*

In order to establish an appropriate approach to the problem, five legal and theoretical questions on the Mexican legal and institutional system are raised:

- 1) *Is the current military Mexican legislation on par with contemporary international human rights legal frameworks and international humanitarian law standards?* During this research various legal gaps that exist inside the Mexican legislation have been found and their main flaws are described. Then the international frameworks on accountability, states of emergency and civil-military relations are analysed to understand the concepts that have shaped modern standards on these topics.
- 2) *Which are the current failures in the legal ground for the legitimacy of the Mexican army's deployment?* Research on the most emblematic human

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<sup>21</sup> A. Ahmed, "Mexican Military Runs Up Body Count in Drug War" (*The New York Times*, May 26 2016) <[http://www.nytimes.com/2016/05/27/world/americas/mexican-militarys-high-kill-rate-raises-human-rights-fears.html?\\_r=0](http://www.nytimes.com/2016/05/27/world/americas/mexican-militarys-high-kill-rate-raises-human-rights-fears.html?_r=0)> accessed 16 June 2016

rights abuses cases is conducted, and the current legal frameworks that justified the army's deployment are analysed according to contemporary international standards of emergency powers.

- 3) *Can Germany and Northern Ireland be the models for a comparative study with Mexico, in order to reform the military institutions and civil-military relations of this last one?* Germany has been chosen as the first subject of comparison, in order to analyse the post-WWII institutional and legal reforms that had military accountability and human rights as the main points, in order to contrast them to the current military institutions and frameworks in Mexico. The Northern Irish emergency provisions are analysed and subsequently compared through legal methodology with the current Mexican frameworks, in order to identify legal and cultural similarities regarding the consequences that the provisions had on their respective populations.
- 4) *Which should be the main aspects at both legal and institutional levels that would allow a proper accountability system for commanders and soldiers in Mexico?* The comparative study developed in this research attempts to provide the theory to suggest reforms and new structures for new accountability mechanisms and stronger civilian controls over the army.

## **Chapter breakdown**

### *Introduction:*

*Narrating the background of the conflict being analysed, and setting the questions which trigger this research and discussing the methodology to achieve it*

In order to understand why new theoretical insights in Mexican civil-military relations need to be developed, the current security conflict must be explained to justify the need for this research. The questions that arise from this background are the foundations of this project.

### *Chapter I:*

*The background and concepts of Mexico's anti-drug story, plus the relationship with the United States in the context of the war against drugs*

Mexico's relationship with drug-trafficking is long and complex. In this research the twentieth century and past anti-drug operations in which the armed

forces took part are discussed. The other main point is the Mexican-US governments' relationship revolving the anti-drug war. Without understanding how both nations have developed joint security strategies, the current civil-military crisis cannot be understood.

#### *Chapter II:*

##### *International law and accountability for the Mexican civil-military current context*

This chapter covers the topics related to the modern standards of international law for non-international conflicts, and its possible application for Mexico. The topics of State responsibility and individual accountability are also discussed in the light of the recent Mexican Military Justice Code. The relevance of addressing these topics relies on the current debates about accountability for human rights abuses at the hands of the soldiers. There are voices that have called for them to be liable for crimes against humanity; this issue is also analysed in the chapter.

#### *Chapter III:*

##### *Emergency powers, civil-military relations and the Mexican case*

The general concepts of emergency powers, civil-military relations, as well as militarism and the relation between the commanders and the civil State through the twentieth century in Mexico are also discussed. The analysis of these concepts intends to set the legal and cultural context in Mexico, as the cultural elements must be addressed in order to make a in order to make a functional legal comparison.

#### *Chapter IV:*

##### *The German post-WWII military institutional reforms: a lesson for the Mexican case?*

The reforms that Germany carried after WWII in their military institutions are discussed in this chapter. Concepts such as the Innere Führung and figures like the Parliamentary Commissioner on the Armed Forces are also analysed. The current state of the Mexican military institutions is discussed, as this will set the standards in which the institutional comparison is carried in Chapter VI.

#### *Chapter V:*

*An analysis on the state of emergency in Northern Ireland during the 1970s and beyond: civil-military relations in a domestic conflict*

The next part of the legal comparison of this research is described and analysed here. The state of emergency measures, the military deployment that followed this, and the legal reforms carried in Northern Ireland are discussed in this chapter. Policies as internment, the Diplock courts and the infamous “shoot-to-kill” policy are analysed. The use of force and the human rights that were violated during the state of emergency are also addressed. This discussion is useful to choose the points that will be part of the legal comparison with Mexico.

*Chapter VI*

*The German post-WII institutional reforms, the emergency powers declared in Northern Ireland, and their potential implementation in Mexico: a comparative study*

The comparison between contemporary German and the Mexican military institutions is developed here. The emergency powers and all the reforms created by it in Northern Ireland are analysed along with the legal frameworks related to the security strategy in Mexico. The purpose of this chapter is to employ methods of comparative law in order to analyse and propose reforms for Mexico’s civil-military relations, based on the experiences of Germany and Northern Ireland. This chapter is the centre of the research, and the concepts and analysis set in previous chapters serve as the groundwork for these comparisons.

*Conclusions*

**Methodology**

In this research, a comparative study is made between Germany and Mexico analysing institutional reforms, and between Northern Ireland and Mexico regarding the state of emergency and the legal figures that came with it. The first point to set is the fact that this study will not compare entire legal systems, but specific institutions and legal frameworks, as a particular problem has been defined the main source of this research (the conflict between civilian society and the armed forces in Mexico, regarding human rights abuses in the context of the war against drugs). This type of comparison that focuses on *a specific part of the legal and*

*institutional system* is called a *microcomparison*; although, as Zweigert and Kötz have established, both micro and macro comparisons can be flexible and interchange at some points, because the essential rules of systems need to be analysed in order to understand how do legal solutions work in different regions, adopting them in the most natural way.<sup>22</sup> In the case of the comparison between Germany and Mexico, the German Basic Law, which is the framework in which the German State and its fundamental rights are built upon, are analysed in their relevant points to see the goals behind the reforms that allowed the creation of democratic institutions and controls over their army. This will be contrasted with the constitutional framework regarding the armed forces in Mexico. Starting the analysis at a constitutional level and then moving to secondary frameworks and comparing selecting certain institutional models, allows understanding the social reality of the institutions in both countries and subsequently provide for better models to find what Zweigert and Kötz viewed as one of the main goals of comparative law, which is *the resolution of social conflicts and the discovery of models that would provide such solutions*.<sup>23</sup>

In terms of the approach taken to perform the analysis, a comparison based on *functionality* (defined as the success in applying the systems being compared at the field level) is adequate, as this type of approach keeps its focus on concepts that have the same function.<sup>24</sup> In order to establish the functionality of the institutions and legal concepts analysed, this study must take into account the cultural differences which might affect the functionality of the objects of comparison. The institutional reforms in Germany and the emergency provisions in Northern Ireland were selected for this study because they were developed as a response to specific conflicts that such societies had. Therefore, a comparison based entirely in plain positivism cannot be possible because, as Hofstede established; when we compare societies we are “studying culture”.<sup>25</sup> An example of this last statement is the reference from specific cases of human rights abuses in Mexico which are described in this research, as Hofstede also states that “data collected from individuals within cultures” is an essential part of most studies comparing aspects of

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<sup>22</sup> Zweigert, Kötz, *An Introduction to Comparative Law* (Oxford University Press, 3<sup>rd</sup> ed, New York 1998) 5-6

<sup>23</sup> Ibid 15

<sup>24</sup> Ibid 34

<sup>25</sup> G Hofstede, *Culture's Consequences: Comparing Values, Behaviours, Institutions, and Organisations Across Nations* (Sege Publications, 3<sup>rd</sup> ed, London 2001) 15

different societies,<sup>26</sup> hence the use of case studies as a part of the social context that gave birth to the civil-military relations conflict. Consequently, a modern approach to legal positivism called *refined positivism* is used, as it takes into consideration the social context and the meaning that the community which created the institutions and legal frameworks had in mind.<sup>27</sup> This is interpreted as “identifying valid legal sources and determining the content of the rules they contain”,<sup>28</sup> as Van Hoecke establishes.

*Refined positivism* makes the comparison with Northern Ireland possible, as this country is ruled by a Common Law system, which is different from both Germany and Mexico which have a civil law system. The comparison study is focused on the functionality of the emergency provisions applied, which had aims that can be comparable with the aims that the Mexican State has in the current security strategy. This comparative study is not only focused on the technical details of the emergency provisions that were applied in Northern Ireland, but also on the aims that such provisions had and their effects at a field level. To put an example of refined positivism applied in this research, the concept of what is understood as “reasonable” suspicion when it came to State to arrest a citizen<sup>29</sup> is analysed. With this approach it becomes easier to understand the meaning of the concepts which the State had in mind when legislating frameworks, as the social context which was the background for the “troubles” in Northern Ireland is also taken into account in order to understand the acts of will that constitute the law, as these are analysed with “a meaning created by a certain type of community”.<sup>30</sup> This is also exemplified in the case of Germany, as their institutional reforms had the goal of breaking with the culture established by the Nazi regime and the damage that this experience had over the whole German society and their military institutions.

The theories mentioned above work at a microcomparison level, because they can be used to identify specific problems within a part of a legal system. Van

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<sup>26</sup> Ibid 15

<sup>27</sup> M Zirk-Sadowski, “Legal Epistemology and Transformation of Legal Cultures” in M. Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, USA 2004) 25

<sup>28</sup> M Van Hoecke, “Deep Level Comparative Law” in M. Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, USA 2004) 166

<sup>29</sup> *Fox, Campbell and Hartley v The United Kingdom* 12244/86, 12245/86, (1990) 13 EHRR 157, [1990] ECHR 18, 12383/86 [30], [31], [32]

<sup>30</sup> M. Zirk-Sadowski (n 27) 25

Hoecke also refers to the cultural context when he states that even though research dealing with comparisons is focused on rules, these cannot be “isolated from their legal and non-legal context”, because the rules are developed with the knowledge acquired through “legal education, and their familiarity with the national, regional and local (non-legal) cultures, through their general education and their socialisation in the relevant communities”.<sup>31</sup>

Since this comparative study is seeking to find theoretical solutions for the current conflict of Mexican civil-military relations, the comparison would also be considered *de lege ferenda/de lege lata* (which means comparing rules that are already in working order in a system, to seek for solutions to apply in another system). As Karhu establishes, this type of study is easier to perform on systems that share similarities, which can be historic for example, and undoubtedly the case of the current Mexican conflict draws parallels with both Northern Ireland during the deployment of the British armed forces, and Germany’s institutions before the end of World War II (although a comparison of pre-WWII institutions will not be made, as the aim is to apply the German reformist concepts into the Mexican system). The author explains that when these elements are reunited, there is “a constant possibility of exchanging legal ideas and plans for legal reforms”,<sup>32</sup> which is the main goal of this comparative study. Karhu also states that this type of study would work in “dealing with something already in force in another legal system”.<sup>33</sup>

The base in which this comparative study will work has already been analysed in previous chapters, as Zweigert and Kötz state that the first step for building a comparison is to complete reports of the different systems being analysed.<sup>34</sup> In order to build an appropriate system for the comparison,<sup>35</sup> general concepts such as *accountability*, *human rights*, and *civil-military relations* are used, because these concepts exist in all the systems being compared and the functionality of the topics being studied will be easier to identify. At the moment of the comparison an *intermediate theory* approach would be adequate to use, as both

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<sup>31</sup> M. Van Hoecke (n 28) 167

<sup>32</sup> J. Karhu “How to Make Comparable Things: Legal Engineering at the Service of Comparative Law” in M. Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, USA 2004) 80-81

<sup>33</sup> *ibid* 80-81

<sup>34</sup> Zweigert, Kötz (n 22) 43

<sup>35</sup> Zweigert, Kötz (n 22) 44

the objective and subjective meanings of the institutions and the legal frameworks being studied are analysed. As Van Hoecke establishes, both the wording in the frameworks and the social context need to be taken into account,<sup>36</sup> as even though we are comparing countries which are part of the western world, the differences in culture and development are large, and such elements cannot be overseen. In this case we would be establishing an *intracultural* study, as the societal types are similar, because, as it has been mentioned, they are Western countries regulated by non-religious legal systems and institutions, and their socioeconomic systems are liberal. Regarding the subjective elements, Da Cruz also establishes that a modern comparatist should also be “something of a polymath, highly learned in a variety of disciplines and extremely conversant with the socio-cultural backdrop to the subject matter of comparison”.<sup>37</sup> Apart from those considerations other concrete rules do not apply, as da Cruz establishes that comparative law is “primarily a method of study rather than a legal body of rules”.<sup>38</sup> Again, these theories have no major problem fitting into a microcomparison and at the same time allow understanding the functionality of its application in a better way, as cultural aspects are taken into consideration.

Finally, the steps suggested by da Cruz<sup>39</sup> for developing a comparative study are the most appropriate for this type of work. These steps consist in 1) identifying the problem and trying to clarify it as much as possible; 2) identifying the foreign jurisdictions and institutions and establishing the legal root to which they belong (in this concrete case there are no religious or mixed systems, which simplifies this task); 3) defining the primary source 4) gathering the relevant material; 5) organising the sources according to the legal bases of the system being researched; 6) developing hypothesis to the answers of the issue being analysed, taking into account legal and non-legal factors; 7) analysing the deep meaning of the principles; and 8) establishing the conclusions, including critical commentary that can relate it to the questions asked at the beginning of the present research.

This research could have used other countries as the subjects for a legal comparison; the cases of Eastern European countries were also relevant, as they

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<sup>36</sup> Zweigert, Kötz (n 22) 185

<sup>37</sup> P. da Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, 3<sup>rd</sup> ed, New York 2007) 235

<sup>38</sup> *Ibid* 5

<sup>39</sup> *Ibid* 242-245



experienced transitions from authoritarian regimes, to more or less liberal democracies, which included reforming their military culture and their constitutions. Cases of militarisation in South America during the 1970s were also attractive to compare, but Germany and Northern Ireland were selected as they were considered successful experiences which had elements that could be applied to the Mexican case in order to improve their civil-military relations. Germany has developed a highly democratic institutional culture, which includes a military that has kept a very stable and positive relation with civil society. Northern Ireland went through unsuccessful experiences dealing with the application of emergency measures, some of them which share close similarities with the current situation in Mexico. In this case, it is the human rights reviews and pronouncements from international and domestic courts which are relevant, as they established the flaws of the State concerning the protection of its citizens and the frameworks that were developed to confront non-State actors in a domestic conflict, and provided access to justice for the victims and their relatives in high-profile cases.

## Chapter I

### **Preliminary concepts, the historical background of anti-drug operations in Mexico and the geopolitical context with the United States of America**

#### **1.1 Organised Crime**

The concept of “organised” crime is appropriate to analyse first, as the Mexican government is addressing this concept in a different way than the rest of the criminal concepts. Part of the State’s justification for the armed forces’ deployment is the fact that civilian security enforcement has not been successful at tackling this type of crime. The International and domestic legislations in Mexico have adapted certain frameworks in order to tackle and impose sanctions to organised crime. The need to create special codes displays the different conceptions that States have for such type of criminality.

The UNCTOC defines organised crime as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.<sup>40</sup> This modern concept takes in account the number of members needed in order to be considered a criminal organisation. It also mentions the obtaining of a benefit as the main objective of those involved in this activity (a circumstance established also by the Rational Choice drug policy).

The UNCTOC also establishes that organised crime “(a) It is committed in more than one state; (b) It is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) It is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state; or (d) It is committed in one state but has substantial effects in another state”.<sup>41</sup> The convention also establishes protocols for each participating state to implement at a domestic level, which includes criminalization for those who take participation in organised criminal groups, money

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<sup>40</sup> Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNCTOC)

<sup>41</sup> *ibid* Art. 3 (2)

laundering and corruption. It should be noted that Mexico was one of the countries that signed the convention.

Regarding Mexico's domestic law, the Federal Law Against Organised Crime bases their description of organised crime on the definition contained in the above mentioned Convention, as the translation of the 2<sup>nd</sup> Article establishes the following: "When *three or more persons*, organise as a fact to perform, in a permanent or repeated way, conducts that by themselves or united with others, have as an end or objective committing one of some of the following misconducts, will be sanctioned by this fact, as members of organised crime..."<sup>42</sup>

Based on the different scopes that academics and experts on the topic have established, we can conclude that *Organised Crime is a network-like enterprise which operates in the informal market with a continuous presence in time and whose main objective is to obtain an economic gain through the fabrication, sale, buying or realization of illicit goods and deeds.*

## **1.2 Drug Trafficking**

Perhaps, the most important branch of organised crime, -not only in a domestic level in Mexico, but also in an international context- is drug trafficking. The complexity of the problem and the severe consequences in a social, economic and human rights context makes it an essential task for every State that considers itself to be on par with contemporary democratic standards or that is in the process of reaching such status.

It is important to include the definition that the US frameworks give to the act of trafficking drugs, because they have been the principal promoter of anti-narcotics strategies around the world; and, as it will be seen in this chapter, they were the security strategies which involved the use of the armed forces in Mexico were the product of Mexico-US joint strategies. The US Code 21, Chapter 24 defines Drug Trafficking as "any illicit activity to cultivate, produce, manufacture, distribute, sell, finance, or transport narcotic drugs, controlled substances, or listed chemicals, or otherwise endeavour or attempt to do so, or to assist, abet, conspire, or collude with others to do so."<sup>43</sup> The aforementioned code focuses on the product itself, as the drug policies have set a standard of the types of substances that are considered harmful. It also focuses on the desire to associate with other persons, which leads

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<sup>42</sup> Federal Law Against Organised Crime 2012 (MEX) art 2

<sup>43</sup> *The US Code title 21 – Food and Drugs* 2015 (US) ch 24

us to the modern definitions of organised crime that establish the need for a certain number or persons with the intention to engage in such activities.

In Europe, key actors have also legislated special frameworks focusing on drug trade enforcement. The Drug Trafficking Act of 1994 (UK) establishes as a misconduct the “retention or control by or on behalf of another person of the other person’s proceeds of drug trafficking is facilitated of the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person’s disposal or are used for the other person’s benefit to acquire property by way of investment”.<sup>44</sup>

As the economy became globalised, the anti-drug concepts also adapted to the modern systems. Contemporary concepts focus not only on the product itself, but also the ways in which the criminal will carry on his operations. Money laundering is mentioned through the words “funds”, “property” and “investment”, as most criminal organisations rely on this type of activity. Modern criminal organisations –whether it is drug trade, human trafficking or terrorism-, have to rely in the structures imposed by free market in order to operate financially in the globalised modern economies.

The United Nations Office on Drugs and Crime defines *drug trafficking* as a global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws.<sup>45</sup> This definition is practically identical to the one established by the US Code and focuses on the product, more than the features of the ones who operate it. By its part, the Federal Bureau of Investigation (FBI) defines organised crime as:

“any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole”.<sup>46</sup>

These definitions are useful to understand the way in which the Mexican organised crime operates inside and outside of their homeland. It is relevant in the

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<sup>44</sup> The Drug Trafficking Act 1994, s2 (a) (b)

<sup>45</sup> “Drug Trafficking” (*United Nations Office on Drugs and Crime*)  
<<http://www.unodc.org/unodc/en/drug-trafficking/index.html>> accessed 15 March 2012

<sup>46</sup> “Organized Crime – Glossary of term” (*The FBI Federal Bureau of Investigation*)  
<<http://www.fbi.gov/about-us/investigate/organizedcrime/glossary>> accessed 20 March 2012

current context, as the different security policies built by the government have not been successful to track down the cartels' financial funds, but instead have focused on physical confrontation with the criminal members.

### **1.3 Characteristics of drug trafficking organisations**

In the last years, the security strategy in Mexico has been focusing in arresting and trailing kingpins, as the task of the armed forces moved from finding and eradicating crops, to clashing with organised crime groups and arresting their high-rank members. As the concept of drug trafficking itself, their organisations also have certain attributes that differentiate them from other criminal groups.

Organisations that focus on the traffic of drugs tend to be classified in the same level as the terrorist organisms. To illustrate a similarity, both organisations view violence as one of the most effective ways of making political statements and positioning themselves in the eyes of the public. Regarding the conceptual differences, one of the key concepts that distinguishes drug trafficking bands from terrorist groups is that an organisation whose principal object of handling are illegal drugs must assure that their targets (customers) are alive and able to pay and consume their products. Nevertheless, there is a significant distinction between the corporate culture of a smuggling organisation and that of a terrorist group.<sup>47</sup>

As most criminal organisations around the globe, Mexican Drug Trafficking Organisations have their own characteristics that set them apart from their counter peers in other places. The United Nations, through academics such as James Finckenauer and Joseph Fuentes, have established some important characteristics of the Mexican organisations: The first characteristic and the one that is defined by the geopolitical situation, is that most of the drugs being trafficked by Mexican groups have the U.S. as its principal destination. As a fact, approximately half of the cocaine in this country enters from the U.S. – Mexico border<sup>48</sup>. The structure of the Mexican organisations seems to be hierarchical, with well-known kingpins who appear as leaders. There seems to be cases of organisations that emerge out of older ones, with members of certain groups who leave them to engage with other

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<sup>47</sup> T.G. Lichtenwald, "Drug smuggling behaviour, a developmental smuggling model (part 2)" (*The Forensic Examiner*) p. 19 <[http://www.all-about-psychology.com/support-files/drug\\_smuggling\\_part\\_2.pdf](http://www.all-about-psychology.com/support-files/drug_smuggling_part_2.pdf)> accessed 5 April 2012

<sup>48</sup> J. Finckenauer, J. Fuentes, G. Ward, "Mexico and the United States: Neighbors confront Drug Trafficking. (*United Nations Activities*)" <<https://www.ncjrs.gov/pdffiles1/nij/218561.pdf>, accessed 12 February 2012>

bands or even form their proper cartels (such is the case of the Zetas, which used to be ex-soldiers working for the Gulf cartel).<sup>49</sup>

Another characteristic is that, being Mexico a country with a large territorial extension, drug cartels need to organise themselves not only in networks, but actually in territorial partnerships, which is called the *Federation*.<sup>50</sup> This serves as a way to protect them and to improve the logistic of their operations. Corruption from the security and political institutions is another issue that is considered as a seminal characteristic of Mexican cartels. To point an example, in 2009 federal security tests were applied to Tijuana's police and it was found that only 10% approved it.<sup>51</sup>

There seems to be a moral system in drug smuggling groups that judges the behaviour and actions committed by their members as the ground for being promoted in the structure of the organisation. While there are no written laws or codes (obviously due to their existence only in the informal market), concepts such as blood relations, closeness, trust and respect and experience define the place of each member inserted in this types of organisations. This may explain the heinous ways in which members of the Mexican cartels resolve conflicts between themselves. There is no professional relationship per se, so problems between the members tend to rely on subjective elements.

The extreme level of violence generated by the cartels is becoming a common denominator between Mexican drug cartels. U.S. analysts have attributed murders of innocents, torture, beheadings and car bombs to these groups. Another fact established by security academics is that although the violence is concentrated on a small number of municipalities, it is spreading with speed across the whole country, especially in the northern states, which share the border with the U.S.<sup>52</sup>

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<sup>49</sup> B. Kilmer, J.P. Caulkins, B.M. Bond, P.H. Reuter, "Reducing Drug Trafficking Revenues and Violence in Mexico, Would Legalizing Marijuana in California Help?" (*Rand Occasional Paper*) p. 36 <[http://www.rand.org/pubs/occasional\\_papers/2010/RAND\\_OP325.pdf](http://www.rand.org/pubs/occasional_papers/2010/RAND_OP325.pdf), accessed 10 January 2012> 36

<sup>50</sup> J. Finckenauer, J. Fuentes, G. Ward (n 48)

<sup>51</sup> B. Kilmer, J.P. Caulkins, B.M. Bond, P.H. Reuter (n 49)

<sup>52</sup> J. Beittel, "Mexico's Drug Trafficking Organisations: Source and Scope of the Rising Violence" (*CRS Report for Congress*) pp. 1, 13 < [www.fas.org/sgp/crs/row/R41576.pdf](http://www.fas.org/sgp/crs/row/R41576.pdf), accessed 11 December 2011>

#### 1.4 What are the current policies against drug trade and what is the theoretical background behind them?

Recent studies have focused on the types of strategies that governments use to face drug issues:

- 1) Demand reduction: demand for drugs is the centre of the phenomenon, so they focus on preventing individuals from consuming drugs to lower sales and consequently, achieving a reduction in all the drug issues.<sup>53</sup> Another theory establishes that the effects of drug enforcement will depend on the response of buyers and sellers.<sup>54</sup>
- 2) Supply reduction: the strategy focuses on reducing the amount of availability to increase the prices and dissuade possible consumers.<sup>55</sup> There are theories that indicate that the former strategy tends to fail, because the seizing of drugs is not effective, narcotics can be replaced effortlessly, even more than the actual dealers, although these can be replaced in a short amount of time.<sup>56</sup> Due to the need of the organisations for members who will keep supplying narcotics, the former proves that this strategy is strongly related to the one that focuses on demand reduction. Even in a market with organisations as large as the Mexican cartels, leaders of organisations, -also known as “kingpins”- can be replaced without disrupting the availability of illegal drugs.<sup>57</sup> Finally, it’s been established that enforcing restriction tends to increase drug prices, that less than its expected.<sup>58</sup>
- 3) Crime reduction: focuses not on the selling or consumption of drugs, but on reducing the number of crimes committed by users to afford buying them and crimes committed as a consequence of drug addiction.<sup>59</sup>

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<sup>53</sup> D.R. Mares. *Drug Wars and Coffeehouses* (CQ Press, Washington D.C. 2006) 29-30

<sup>54</sup> A.R. Kleiman, P. Caulkins, A. Hawken, *Drugs and drug policy, what everyone needs to know* (Oxford University Press New York 2011) 44

<sup>55</sup> Mares (n 53) 30

<sup>56</sup> A.R. Kleiman, P. Caulkins, A. Hawken (n 54) 44

<sup>57</sup> *ibid* 56

<sup>58</sup> *ibid* 48

<sup>59</sup> Mares (n 53) 30

- 4) Harm reduction: this strategy focuses on reducing negative consequences on individuals' health.<sup>60</sup> Recent theories establish that a harm reduction policy should focus on "...the reduction of drug related harm rather than drug use per se, where abstinence-oriented strategies are included, strategies are also included to reduce the harm for those who continue to use drugs; and, strategies are included to aim to demonstrate that, on the balance of probabilities, it is likely to result in a net reduction in drug-related harm".<sup>61</sup>
- 5) Civil rights: this theory states that individuals' freedom is more important than any drug policy, consequently, the government does not create any type of policy against drugs and leaves it to each one's responsibility.<sup>62</sup>

After comparing the different strategies that contemporary states employ to tackle drug trade, it can be established that Mexico is currently following the Supply Reduction policy, without employing an integral plan that would also focus on the consumers and the reduction of harm, in order to decrease the demand, and not only focusing on the supply.

### **1.5 The historical background of two nations that share the same security issue**

In order to understand the contemporary security strategy that the Mexican government is exercising against organised crime, it is appropriate to explain the importance of the United States in order to understand why Mexico has been completely dependent on the Americans' own strategies. The geopolitical context of both nations has created one of the most complex bilateral affairs in security and political matters; one that has not been solved since the 1960s, when –in the context of the Cold War–, the US government decided to strengthen their enforcement against drug-trafficking. This chapter seeks to describe and explain the failure of all past security policies, as this will set a strong base to explain the possible outcomes of the current research.

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<sup>60</sup> *ibid* 30

<sup>61</sup> S. Lenton, E. Single, "The definition of harm reduction" (1998) 17 *Drug and Alcohol* 213, 216

<sup>62</sup> Mares (n 53) 31



The importance of discussing the relationship between Mexico and the United States in this research is due to the fact that, as it will be described, the armed forces did take part on various anti-narcotic operations in the past, and even though their actions were not established with the required legal mechanisms, the various deployments were not permanent, and the government did not consider them as central to their security strategy. It is relevant for the contextual understanding of the subsequent chapters to describe the role that drug trafficking has taken in shaping the security strategies of both the US and the Mexican government, as well the reactions that the presence of the army caused among society.

Since the creation of its modern post-revolutionary State, legality in Mexico has always been subordinated to different political and subjective interests. The construction of legal frameworks is a task that requires a broad effort in order to adapt it to societal current contexts. There is practically no information available about the legal support that past Mexican presidents have used in order to deploy the armed forces in public spaces to perform security tasks. The geopolitical factors that gave birth to the anti-drug operatives in the 60s and 70s in which the army was committed to perform certain tasks will be analysed.

During the XX century, the armed forces were deployed more by request the United States than of the Mexican government. Part of what explains the former statement is that the American government sees Mexico as the principal source of drug supply to their territory, although both nations have combined efforts to eradicate this issue. With the rise of violence generated in Mexico due largely by the clashes between organised crime members, the drugs issue has become a matter of national security for the entire region. The Geography and Statistics National Institute (INEGI) reported that between 2007 and 2011, 95,632 homicides were documented.<sup>63</sup>

It is important to analyse two events that are crucial in order to understand the current governmental strategy. The first event is the *Operation Interception* in 1969, and the second one is the *Operation Condor*, being started in the mid-seventies. Each operation had drug-trafficking as the centre of the strategy; although, as it will be seen in this chapter, the principal objective of the US

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<sup>63</sup> JA Zuñiga, "In 2011, 27 thousand 199 homicides were perpetrated: INEGI", (*La Jornada*, 2012) <<http://www.jornada.unam.mx/2012/08/21/politica/003n1pol>> accessed 21 August 2012

government with Operation Interception was to put pressure on its southern neighbour and make him feel politically forced to start a combined strategy against organised crime.

### **1.5.1 Operation Interception**

The Nixon administration had noticed an important rise in the use of narcotics, coming from Mexico to the United States. The Mexican General Attorney, Julio Sánchez Vargas, admitted that this issue was affecting both nations and agreed to start the biggest antidrug campaign of the country's history in which two thousand soldiers, ships and helicopters were involved.<sup>64</sup> This would be the first time that the army was directly involved in an operation to tackle the trafficking of narcotics. Around this time the first disagreement between both governments took place. On the 28 of August of 1969, the North American Defence Department declared Tijuana a forbidden zone for all the military. The Mexicans reacted defensively,<sup>65</sup> as this was considered an arrogant overreaction to a problem that was shared between both sides of the border.

On the 21<sup>st</sup> of September of 1969, Operation Interception was launched; this operative included the intensified vigilance of land, sea and air of almost six thousand kilometres across the border with Mexico, such policy would be maintained for an "indefinite period"<sup>66</sup> (little did both governments know at that time that it would only last for a couple of weeks). When the drivers, pedestrians and passengers of airlines would come close to the revision points of thirty-one entrances and twenty-seven aerial terminals, a pamphlet in English and Spanish that explained what would happened was given to them. Everyone, regardless of their position or nationality was scrupulously searched.<sup>67</sup> All this caused serious issues in the border due to the inability of passengers to travel in a fluid manner, having to wait for 6 or 7 hours to cross from one side to the other. All this caused a considerable economic damage to both countries, the market and tourism dropped, causing a stir from the enterprise, which supported the seizure of drugs but condemned the strategy used for this.

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<sup>64</sup> R. Craig, "Operation Interception: an International pressure policy" (1981) 22 *Foro Internacional* 203, 207

<sup>65</sup> *ibid* 209

<sup>66</sup> *ibid* 214

<sup>67</sup> *Ibid* 214

The customs captured an average of 18.6 kilograms of marijuana per day across the border in 1968. During the twenty days that the Operation Interception lasted, 1,943 kilograms were captured, being this an average of 59 kilograms per day.<sup>68</sup> Even though the number of drugs confiscated exceeded by much the previous operatives, it still did not made up for the enormous amount of money and personnel assigned to this task. Besides, the political conflict created between both nations was a collateral damage that the American State's arrogant decision did not take in account before. If the operation was measured according to the number of drugs confiscated, it would not have been worth it. But the principal objectives were to impress the public with the "antidrug war" that the government carried out and to "make the Mexicans work, in order for them to really fight against the cropping and traffic of drugs".<sup>69</sup> Statements of this sort were expected, as the Nixon government was relying on a populist strategy that would give them strength upon their citizens.

The stress and conflicts that this operative caused, forced the North American authorities to put an end to the Operation Interception on the 10<sup>th</sup> of October of 1969.<sup>70</sup> Then-president Gustavo Diaz Ordaz formally complained about the general feeling of resentment caused by Operation Interception, and Nixon finally ended the strategy, probably more by the American businessmen pressure.

As the 1960s evolved, a new generation of teenagers felt out of place of the bourgeois society that developed as a consequence of the industrial revolution. In their search for alternative lifestyles, the *hippie* movement developed and they started to experiment with drugs such as marijuana and LSD. As a result, drug addiction raised in the US in the second half of the decade. Also, another collateral consequence was the diplomatic conflict caused between the Mexican and North American States. The only positive outcome of the operation (at least, from the US point of view) was the commitment of Mexico to start developing anti-drugs strategies.

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<sup>68</sup> *ibid* 215

<sup>69</sup> *ibid* 216

<sup>70</sup> *ibid* 227

### 1.5.2 Operation Condor

This antidrug campaign would include the use of defoliant chemicals. In the fall of 1976, Operation Condor became the core of this program.<sup>71</sup> Using hazardous chemicals represented a high risk for potential consumers, but in the eyes of the government this was considered the best way to eradicate cultures. The Mexican government decided to implement a permanent campaign, pouring \$35 million into the effort.<sup>72</sup> The importance of this operation was that for the first time the Mexican army would be used in a semi-permanent way, in coordination with the federal police and the Justice Department (PGR), for the purpose of developing a “war against drugs”. This operation was also jointly developed between the Us and the Mexican governments, as American intelligence agents also participated.

In January 1977, Operation Condor was officially launched in the heart of Mexico’s opium zenith; Condor was named “war” by the general attorney Oscar Flores Sánchez.<sup>73</sup> This was the first time that this term was used to describe a security strategy; it was also probably applied to justify the inclusion of the armed forces in the operation. The government strategy consisted in deploying 2,500 soldiers, 250 federal police, units of the Mexican air force and navy, state and local police, and an undisclosed number of DEA agents. Two primary tasks faced the civilian and military commanders of Condor I: eradication of the illegal crops and pacification of the countryside.<sup>74</sup> The principal difference between Condor and the current strategy is that military personnel were not deployed in the urban landscape; their presence was limited to the cultures where the drugs were being raised. As it will be seen later in this chapter, this didn’t prevent the citizens from being abused, but the scale was much more shorter than the current figures show; another factor is that countryside citizens are considered the most deprived in the country, a situation which makes more difficult to expose their complains.

The personnel involved in Condor did not have an easy task either; pilots often encountered heavy ground fire; some crashed while spraying; others were killed when their helicopter blades struck well-hidden cables strung from one hillside to another; It can be established that pacification of the countryside proved even

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<sup>71</sup> R. Craig “Mexico’s Antidrug Campaign Enters a New Era” (1980) vo.11 no.3 *Journal of Interamerican Studies and World Affairs* 345, 346

<sup>72</sup> *ibid* 347

<sup>73</sup> *ibid* 350

<sup>74</sup> *ibid* 351

more difficult than eradication of opium and marijuana fields.<sup>75</sup> A lot of the peasants got all their income from growing these drugs; as they would resist the military actions even by risking their own lives. Even in this period, army units that located a drug centre occasionally went beyond the call of duty; according to a well-placed American diplomat in Mexico City, houses were ransacked, men beaten, women violated, and belongings confiscated.<sup>76</sup> As it can be seen, the same complains that are being made today by citizens, were a subject of discontent 35 years ago. This shows that, although the armed forces have been professionalized in the use of technology and security tactics, the coexistence with society is still a subject that still has not been engraved in their doctrine.

Desperate peasants were flooding the cities, abandoning *ejidos* (communal plots) and private plots, streaming across the border as illegal immigrants, and becoming drug entrepreneurs; although, only one activity -involvement with narcotics-, caused deep official concern and determined action.<sup>77</sup> Peasants did not have recourse other than engage in the drug culture, so, after Operation Condor, the number of immigrants raised considerably. Decades have passed, and the Mexican State has not been able to eradicate the drug-trafficking issue from its social roots.

Operation Condor lost its impulse and effectiveness in the first years of the 80s, and Mexico started to be, once again, an important marijuana and heroin supplier to the North American market, as well as a path for the cocaine that started to go from South America to the United States.<sup>78</sup> The aftermath was the rise of immigration to the US and depravity in the countryside, plus, the organised crime groups that had settled in the Golden Triangle, simply moved to states such as Jalisco, Michoacán and Guerrero.

### **1.5.3 The current security strategy**

On the 11<sup>th</sup> of December of 2006, just a few days after Felipe Calderon took office as President of Mexico, the presidential office announced a joint strategy called "Michoacán", taking the name from the state where the new security strategy

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<sup>75</sup> *ibid* 353

<sup>76</sup> *ibid* 354

<sup>77</sup> *ibid* 355

<sup>78</sup> J. Chabat "Drugtrafficking in the Mexico-United States relations: The sources of the conflict" (2009) no.193 *Documentos de Trabajo del CIDE* 1, 3

began (Michoacán is also Calderón's home state). The official announcement of the strategy was done not by Calderon, but by members of his cabinet, these being Maximiliano Cortazar –Chief of Communications of the Presidency; Francisco Ramirez Acuña – Secretary of Government; Guillermo Galvan Galvan –Secretary or National Defence; Francisco Saynez Mendoza –Secretary of the Navy; and Genaro Garcia Luna –Secretary of Security.

Ramirez Acuña established that the aim of the security strategy was "...to recover the public spaces that organised crime has taken away...a policy that will finish with the impunity of the criminals that endanger the health of our children and the peacefulness of our communities".<sup>79</sup> Regarding the role of the armed forces, the same secretary established that the State would deploy "...more than five thousand elements (military) for this operation in which different activities such as eradication of illicit plantations, the establishment of control checkpoints to decrease drug traffic in highways and secondary roads, the implementation of search warrants and arrest orders, as well as location and dismantling of drug selling points will be made".<sup>80</sup>

The strategy had initial success, as the number of murders in Michoacán decreased between 2007 and 2008.<sup>81</sup> This encouraged the government to replicate the strategy in seven states (and subsequently in all the country), but the results were vastly different, as in 6 of the 7 states that were militarised the number of murders related to drug traffic increased 32% between 2007 and 2009.<sup>82</sup> When the current Peña Nieto administration took office, most of the basic grounds of the strategy were left intact: the only institutional change was the creation of the Commission for Security and Integral Development in Michoacán, which carried on with the same military approach to the drug traffic issue.

The Mexican think tank Centre of Investigation for the Development (CIDAC) developed a study on the security strategy that Calderon implemented, and current president Peña Nieto has maintained basically without any substantial changes. One of the first observations made by the CIDAC is the degrading of the public

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<sup>79</sup> Official residence (n 3)

<sup>80</sup> *ibid*

<sup>81</sup> "In 2007 there were 38% less murders than in 2006, and in 2008 there were 45% less than two years before – The Failed Strategy" (Nexos)  
<<http://www.nexos.com.mx/?p=15083>> accessed 8 December 2015

<sup>82</sup> *ibid*

image that the armed forces have suffered as time passes by.<sup>83</sup> The Calderon government tried to reform the civil police system by implementing a program called Accountable State Police, which among other things, would apply trust controls to police bodies. According to CIDAC, this strategy failed, as the perception of impunity increased from 40% to 41% in the states whose police bodies received the control tests. The study establishes that this was due to the fact that the strategy focused on the individuals and not on creating an accountability system that is independent from the government.<sup>84</sup> The spread and increase of drug-traffic related violence is the most severe side effect of the security strategy. Human Rights Watch explains that such increase is the consequence of different criminal groups fighting between them and against the security forces for control of the drug trade and other activities like human trafficking.<sup>85</sup>

When Peña Nieto took office at the end of 2012, the number of murders related to drug traffic had passed the 60,000 mark.<sup>86</sup> As it has been previously stated, the strategy did not have substantial changes, and the militarisation of the country is still on-going. The security forces' reputation has entered a crisis in the last year, since 43 students disappeared, as recent investigations have put the official version in doubt (the government established that the students had been kidnapped by members of organised crime groups), and have linked police and military personnel to the victims.<sup>87</sup> The Tlatlaya massacre, in which 22 persons were allegedly executed by soldiers,<sup>88</sup> has created a lot of backlash against the armed forces, and the animosity between civil society and the army seems more aggravated than in Calderon's administration.

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<sup>83</sup> L. Becerra, M. Meza, "Failures in the security strategy" (*CIDAC*) p. 3. <<http://cidac.org/wp-content/uploads/2015/09/fracaso-seguridad.pdf>> accessed 9 December 2015

<sup>84</sup> *Ibid* 6

<sup>85</sup> "Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs"" (*Human Rights Watch*) 4 <[https://www.hrw.org/sites/default/files/reports/mexico1111webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf)> accessed 10 December 2015

<sup>86</sup> Human Rights Watch (n 4)

<sup>87</sup> "Mexico: Damning Report on Disappearances – Experts Dispute Official Account of 2014 Atrocity" (*Human Rights Watch*) <<https://www.hrw.org/news/2015/09/06/mexico-damning-report-disappearances>> accessed 10 December 2015

<sup>88</sup> Amnesty International, *Amnesty International Report 2014/2015: The State of the World's Human Rights* (Amnesty International Ltd 2015) 248

As the Peña Nieto administration follows its course, the allegations of abuses from the army have not stopped with the most well-known Ayotzinapa and Tlatlaya events (described in chapter VI of this research). The complaints of torture and physical and psychological assault keep on being documented.<sup>89</sup> The government and the security institutions have not establish a date for sending the armed forces back to its headquarters, and give the primacy of security to the civilian bodies.

### **1.6 Mexico's relationship with the US government in the context of the security strategy against drug-trafficking**

During the 1980s the security strategy of the United States changed their law enforcement approach on anti-drug security policies. The White House's Office of National Drug Control Policy (ONDCP), stated that one positive point that arose from the drugs war, was that the US and Mexico "went from a virtually non-existent military-to-military relationship to the formation of a bilateral military working group".<sup>90</sup> In 1986 President Reagan called for the militarisation of the drugs war in both Mexico and the US. Between 1981 and 1995, 1488 Mexicans went to US military academies with over 2000 *Grupos Aeromóviles de Fuerzas Especiales* (air-mobile Special Forces- GAFE's) doing the same in 1997-98. Eventually, some of their members joined the Zetas cartel. Another explanation given is that the security strategy has been used for repressing political and civilian opposition; GAFE members trained for counter-narcotics campaigns by the US military took part in some of the missions against the EZLN (the Zapatista Army of National Liberation is a guerrilla, which began armed actions in opposition to neoliberal reforms on the 1st of January of 1994, showing again the blurring of counter-narcotics and counterinsurgency operations and the US support in the background).

Various analysts state that the principal aim that has shaped the relationship between both countries is the prioritising of economic interests, more than establishing a true anti-drug bilateral plan. Mercille states that the US objectives in Latin America throughout the post-World War II have revolved around ensuring "Adequate production in Latin America of, and access by the United States to raw materials essential to US security", which in Mexico's case applies particularly to its

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<sup>89</sup> On March 2015, Amnesty International reported the mistreatment of Dafne Alejandra de la Cruz. For more information consult:  
<https://www.amnesty.org/en/documents/amr41/1221/2015/en/>

<sup>90</sup> *ibid* 1644



vast oil reserves. Another goal is the “standardization of Latin American military organisation, training, doctrine and equipment along US lines”, which has been accomplished through numerous training and security assistance programs with Mexico. Latin American countries should be encouraged “to base their economies on a system of private enterprise and, as essential thereto, to create a political and economic climate conducive to private investment, of both domestic and foreign capital...”<sup>91</sup>

The historical consequences of drug conflicts have had more to do with operative problems between the bureaucracies of both countries. Additionally, we can find that some of the conflicts are related with the deterioration of the bilateral relation for reasons not directly related to organised crime, such as post electoral conflicts, financial crises, mistakes on the Mexican exterior policies, and illegal migration to the US. The conflicts from the 80s -such as the Kiki Camarena murder-, can be seen as part of this context. Even at times when the relation was in fairly good terms, there were always problems concerning drug dealing, so this suggests that the conflicts that have generated with the drug dealing issue in the bilateral relation are more structural than conjectural.<sup>92</sup> All the problems that have emerged between both countries in security issues conjure corruption and poverty. Beginning in 1982, the concern for drug enforcement led to a series of legal changes that opened a new chapter in US law, allowing the military to provide a vast array of support for civilian police. Much of this military support has focused on the US-Mexico border region.<sup>93</sup>

Some of the most significant structural factors that have detonated the environment of violence in the northern border are drug trafficking, labour migration towards the United States, and since the 90s, trafficking of weapons and money laundering.<sup>94</sup> Finally, US banks have increased their profits by laundering drug

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<sup>91</sup> J. Mercille, “Violent Narco-Cartels or US Hegemony? The political economy of the “war on drugs” in Mexico” (2011) 32 *Third World Quarterly* 1640, 1643

<sup>92</sup> Chabat (n 78) 12

<sup>93</sup> T. Dunn, “Border Militarization Via Drug and Immigration Enforcement: Human Rights Implications” (2001) 28 *Social Justice* 9

<sup>94</sup> J.M. Ramos, “Performance in the security of the northern border and the Merida Initiative: background and challenges” in Armijo Canto (ed), *Migración y seguridad: nuevo desafío en México* (CASEDE Mexico City 2011) 2

money from Mexico and elsewhere;<sup>95</sup> the failure to implement tighter regulations testifies to the power of the financial community in the US. The financial sector's involvement in narcotics has never been rightly regulated because it provides significant liquidity to a powerful segment of US society.<sup>96</sup> White-collar corruption has pressured both the American and Mexican congresses in order to freeze the legislation of political policies that would strengthen penalties against money laundering. US banks have laundered Mexican drug money in the past. In 2010 Wachovia (now part of Wells Fargo) had to forfeit \$110 million to US authorities for having allowed drug-related financial transactions of the same amount, in addition to \$50 million for failure to monitor funds used to ship 22 tons of cocaine. The bank was sanctioned for not applying anti-money laundering procedures to the transfer of \$378.4 billion into dollar accounts from Mexican currency exchange houses.<sup>97</sup> President Obama recently declared that his administration is "putting unprecedented pressure on cartels and their finances here in the United States". It has been estimated that globally banks launder from \$500 billion to \$1 trillion every year from criminal activities, half of which goes through US banks. UN Office on Drugs and Crime (UNODC) Chief Antonio Maria Costa said that drugs money may have rescued some failing banks.<sup>98</sup> The topic of money laundering is essential if the State wants to create a system that can effectively track and shut down the accounts from the cartels.

The US shares much responsibility for drug expansion thanks to its record of support for some of the main players in the drugs trade such as the Mexican government and military, and by implementing neoliberal reforms that have increased the size of the narcotics industry. The war on drugs has served as a pretext to intervene in Mexican affairs and to protect US hegemonic projects such as NAFTA, rather than as a genuine attack on drug problems. J. Mercille states that the drugs war has been used repeatedly to repress dissent and popular opposition

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<sup>95</sup> M Smith, "Banks Financing Mexico Drug Gangs Admitted in Wells Fargo Deal" *Bloomberg* (29 June 2010) < <http://www.bloomberg.com/news/articles/2010-06-29/banks-financing-mexico-s-drug-cartels-admitted-in-wells-fargo-s-u-s-deal> > Accessed 5 October 2016, E Vulliamy, "How a big US bank laundered billions from Mexico's murderous drug gangs" *The Guardian* (3 April 2011) < <https://www.theguardian.com/world/2011/apr/03/us-bank-mexico-drug-gangs> > Accessed 5 October 2016

<sup>96</sup> J. Mercille (n 91) 1640

<sup>97</sup> *ibid* 1649

<sup>98</sup> *ibid* 1648

to neoliberal policies in Mexico.<sup>99</sup> The fact that the US anti-drug security forces were not able to reduce drug trafficking into its territory in a significant amount is another factor. This is where American corruption can be seen in its most obvious ways, as there are currently hundreds of investigations into corruption among US border agents.<sup>100</sup>

There was a break point during the 80s which propelled the expansion and economic rise of Mexican drug cartels. South American cocaine had been smuggled into the US via the Caribbean and Florida, but interdiction efforts diverted the traffic through Mexico. The Colombian drug-traffickers cut a deal with the Mexican cartels to ensure that their drugs would reach the US through Mexico rather than through the Caribbean and Florida.<sup>101</sup> This made Mexico the only path to North America and provided a gold mine for the kingpins. Mercille also states that the flow of narcotics was magnified by the neoliberal reforms that increased commerce across the US-Mexico border. Cartels started putting shipments of heroin, crystal, cannabis and cocaine on the many trucks crossing the border. NAFTA (North America Free Trade Agreement) and neoliberal reforms have increased the size of the drugs industry by involving more Mexicans in it for a reason: lack of opportunities and employment in Mexico. NAFTA has also failed to generate job growth and increase wages; farmers were forced to abandon their land and migrate to the US or move to the cities in Mexico along the US border, where they became cheap labour for US manufacturing businesses. Non-taxed economy became 57 per cent of the workforce in 2004. Many had little choice other than participation in drug trafficking.<sup>102</sup> In fact, migration rose more than ever after the NAFTA signing.

The US-Mexico military bilateral relationship has been preserved and upgraded, first through the Security and Prosperity Partnership of North America (SPP), and then through the Mérida Initiative. Twenty-six armoured vehicles were delivered to Mexico, seven Bell helicopters valued at \$88 million have been provided to the Mexican Army and three UH-60 helicopters valued at \$76.5 million have been delivered to the Federal Police.<sup>103</sup>

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<sup>99</sup> *ibid* 1637

<sup>100</sup> *ibid* 1643

<sup>101</sup> *ibid* 1642

<sup>102</sup> *ibid* 1642

<sup>103</sup> *ibid* 1645

Another complementary fact that illustrates the American share of responsibility in the drug trade affair is the number of arms that enter the Mexico-US border through the American side. It has been estimated that 87 percent of firearms used by cartels originate in the US. A policy of “letting guns walk” has followed; it was approved by the Justice Department. This consists in not arresting drug cartel members in order to track the guns down to Mexico and try to learn more about their operations.<sup>104</sup> The relative easiness in buying a fire arm in the border cities of Texas makes their smuggling into Mexico an authentic treat for the drug cartels. One of the dominant opinions in Mexico is that the problem is created from the inability of the United States to control its domestic demand for heroin, cocaine, and marihuana. The dominant US view has been that the Mexican government has failed to make effective efforts to control the supply of drugs.<sup>105</sup> This is part of the structural conflict that permeates the relationship. It is more comfortable for both sides to blame the other, instead of reforming their institutions in order to end the existing asymmetry. While Mexican officials can be easily corrupted by money that comes from the drug bossiness, the source of the corruption is a sector of US society highly prone to drug consumption. The demand for drugs in the United States is the most serious national security problem for the Mexican government.

Del Villar has stated that one of the most important factors that comes a consequence of the drug-dealing presence in Mexico, is that the US narcotics market produces in corruption in Mexico’s public service. This is magnified precisely because of the massive involvement of the security and enforcement apparatus in eradication campaigns. The financial, security, and corruption costs of such an involvement have become unbearable.<sup>106</sup> Toro indicated that one’s definition of drugs as a national security threat depended on the way one balanced the external and internal factors behind it. To the extent that it was cast in external terms, the risk came from both “the clandestine entry of drug traffickers entering from other countries (possibly in association with Mexican drug traffickers) and from a more active (and unauthorized) participation of DEA agents on Mexican territory”.<sup>107</sup>

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<sup>104</sup> *ibid* 1643

<sup>105</sup> P. Reuter, P. Ronfeldt, “Quest for Integrity: The Mexican-US Drug Issue in the 1980s” (1992) 34 *Journal of Interamerican Studies and World Affairs* 89, 91

<sup>106</sup> *Ibid*, citing Del Villar 1988, 116

<sup>107</sup> *Ibid*, citing Toro 1990, 116

## 1.7 Conclusion

Organised crime in Mexico was tolerated for decades because corruption in this country cannot be considered an abstract issue: it is a form of social organisation. PRI relied on it for sustaining support from all the social layers during their 71-years uninterrupted presidential terms. Corruption was an “unofficial” part of the system which permeated every institution, not only at a governmental level, but also the private sector.

The northern states were able to create a network of corruption, far away from the eyes of the central government due to the lack of communication infrastructure in the early XX century. Governors like Esteban Cantu resembled feudal kings,<sup>108</sup> who established their own institutional system and were able to build an alliance with the drug dealers, due to their proximity to the US border. What they never expected was the economic and armed power rise of the cartels in such a small period of time. Nowadays, organised crime groups seem to have a much better organisation than the governmental security forces. Another key factor is the resemblance of organised crime to enterprises; it is important for the State to attack their economic sources and funding. Unfortunately, it is unlikely to see the current governments deploying such strategies, due to powerful interests, which may be close to high profile politicians. The lack of an integral strategy that focuses not only in the armed side of tackling organised crime, but also in the tracking and closure of their funding, is a main cause for the lack of success of the past and present security policies that the Mexican State has developed.

Another situation that can be addressed is the lack of vision to implement prevention strategies that would focus both on the addicts and the suppliers. Enforcement strategies have been deployed for decades, and since operation *Interception* there has been direct involvement from the armed forces with drug combat. Thousands of millions of dollars have been spent, and yet the results are not only adverse, but appear to have counter effects, such as the rise in the levels of violence. The economic side effects of the war against drugs cannot be overlooked; since the Cold War ended radical neoliberal reforms have been introduced in Mexico due to the pressure of the Americans. Political repression and disappearances of social leaders opposed to these economic reforms, both in cities

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<sup>108</sup> R. Recio, “Drugs and Alcohol: US Prohibition and the Origins of the Drug Trade in Mexico, 1910 – 1930” (2002) 34 *Journal of Latin American Studies* 21, 33-34

and the countryside have been linked to the army and its operations in security tasks.

Regarding the behaviour of the security bodies in all the main security strategies analysed, it is important to note the extremely negative side effects of the armed enforcement in Mexican territory. There are similarities that can be established: the decrease in tourism, the rise of immigration to the US, the complaints from the most deprived sectors of society of the soldiers assaulting and violating their basic rights, and the direct intervention of the American government in Mexico's security policies. Whether it has been merely diplomatic, or with the supply of weapons and economic aid (the largest one being the Merida Initiative), both nations have had the need to work together in the development of the strategies. The results of their cooperation have always damaged Mexico's society tissue more than the American, as most of the armed confrontation takes place in the Mexican side, even though the United States is the main consumer of the drugs being produced and distributed in Mexico.

Analysing the nature of the war against drugs in the context of US-Mexico relations, would be a fascinating subject for a whole research, but this project is focused on creating a legal framework in order to increase protection to civilians, against human rights abuses. Based on the facts stated in this chapter, it can be established that the presence from the armed forces on public space, and their daily interaction with common citizens will be permanent. As it has been stated, contrary to popular belief, the army has been performing security tasks for the past 30 years, and even though the rate of abuses raised at an exponential level since ex-president Calderón implemented the current strategy due to the permanent deployment of troops, it is important to understand that the army has been an integral part of the anti-drug strategies since the first one was conceived.

## **Chapter II**

### **International law and accountability for the Mexican civil-military current context**

There are two main points to analyse in the current context of Mexico's civil-military relations. First, there is the lack of an international monitoring of the armed conflict, even though, as it is discussed in this topic, the security strategy of both the Calderon and the Peña Nieto administrations gathers certain elements that can be subjected to the legal scrutiny of International Humanitarian Law (IHL). Regardless of this elements being present every day in the current strategy, there is not a proper system of international legal surveillance.

Second, the lack of accountability from the armed forces and the security civilian secretaries represents a failure in the democratic system that Mexico wants to achieve. The numerous complaints that involve the armed forces in the last 8 years show that a deficit of legitimacy from the army currently exists. As it will be discussed later, the Military Justice Code reform is a step in the right direction, but it has noticeable flaws, and until this day, only a single military has been sentenced in civilian courts.

Why should international institutions, such as IHL, Human Rights law, and the International Criminal Court (ICC) be considered as relevant to the war against drugs in Mexico? One of the main problems that comes when the armed forces are deployed without a set of reforms and regulations beforehand, is the absence of a correspondent legal body that will regulate this new context, either as a set of established emergency powers, constitutional regulations that would enable a State of emergency, or civilian figures with legal attributions to control the military. National law tends to establish balances and control interests which are confronted; the problem is that the armed forces are traditionally ruled by laws applied to international conflicts. These laws are one-dimensional and do not try to balance interests between parties, as their main interest is to limit as much as possible the possibility of a State force to cause unnecessary damage to the population of the zone where the armed conflict takes part. Therefore, the need for international frameworks that specialise in the regulation of armed conflicts and the protection of universal human rights are important to be addressed in this research.

This chapter covers the academic discussion centred around the international legal frameworks that have focused on responsibility, international humanitarian law, accountability, human rights and the way in which the Mexican State is (or is not) complying with them. There are essential distinctions between IHL and Human Rights Law that are addressed and their sources are also different, especially when concerning its involvement in non-international armed conflicts. These distinctions involve factors like the type of conflict that is addressed, and the institutions in charge of investigating and prosecuting. The relevance of establishing the distinctions resides in the voices that have asked for the ICC to act in the current war against drugs in Mexico; the reports from human rights abuses by members of the armed forces has created the need to talk about possible international intervention. As it will be seen, the potential for IHL and the ICC to be applied in this conflict is complicated and unlikely at the present time, and this chapter seeks to explain the cause for this unlikelihood for its application in the current context.

The current challenges for Mexico in matters of accountability and individual responsibility are also addressed in this chapter. Perhaps, the most important reform that theoretically reforms the mechanisms of accountability for armed personnel accused of human rights abuses is the Military Justice Code reform or article 57. The legal reforms and its application are also discussed here. Finally, transitional justice is addressed as a way of explaining how the Military Justice Code reform is part of Mexico's democratic evolution in the face of its current domestic conflict.

The term "human rights" is not defined as a concept in the Mexican constitution, as the Mexican juridical system does not have a Human Rights Act or code, although the National Commission of Human Rights does define them as:

"The group of prerogatives sustained on human dignity, whose effective accomplishment results indispensable for the integral development of the person. This group of prerogatives is found established on the national juridical order, out Political Constitution, international treaties and laws."<sup>109</sup>

The Mexican Political Constitution establishes in its first article that every person will enjoy of the rights that are both addressed in the Constitution and the

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<sup>109</sup> "What are human rights?" *National Commission of Human Rights*  
<[http://www.cndh.org.mx/Que\\_son\\_Derechos\\_Humanos](http://www.cndh.org.mx/Que_son_Derechos_Humanos)> Accessed 5 October 2016



international treaties that Mexico has signed.<sup>110</sup> Therefore, this thesis refers to human rights as the ones listed on international frameworks which Mexico is a party to, mainly the International Covenant on Civil and Political Rights (ratified on 23 March 1981), the American Convention on Human Rights (ratified on 2 March 1981), and the Political Constitution of the United Mexican States.

## **2.1 Accountability**

A large sector of Mexican society has been pleading to prosecute not only the military personnel who have physically committed human rights violations, but also the commanders and political actors who have given the orders, and/or protected the abusers. When Felipe Calderón issued the Presidential Decree which gave a very questionable legitimacy to the deployment of the Armed Forces, he did not send a proposal to the Federal Congress, and the legislative did not work on any accountability reforms. Another issue resides in the lack of development in criminal responsibility as a theoretical concept in the Mexican criminal codes, both at a federal and at a state level; as a result, countless crimes -which go from verbal abuse to torture and homicide-, have been committed since the end of 2006. The responsibility of sanctioning such acts should not be exclusive to the domestic courts, but also involve the international law institutions, as the conflict meets the requirements for International Humanitarian Law to intervene. In this section, a brief recount of the development of international institutions is explained, along with the main concepts and institutions which are used to bring different State actors to justice. The former will give us an understanding of the needed reforms for the current human rights issue that Mexico is facing. It is appropriate to set a brief historical and theoretical background of the modern development of the concepts which encompass the subject of accountability.

The foundations for the modern concepts of State accountability were established after World War I. In its aftermath, the Allies saw the need to create a commission that would revise and determine if war crimes had been committed; this commission was called the Preliminary Peace Conference. In this event, a majority of its members determined that there was responsibility from the Central Powers, which had proceeded “in violation of established laws and customs of war and the

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<sup>110</sup> Political Constitution of the United Mexican States 2015 (MEX) art 1

elementary laws of humanity”.<sup>111</sup> The Allies eventually included articles regarding the violation of customs of war and laws in the Treaty of Versailles.<sup>112</sup> Although these first treaties were not very relevant at a field level (especially in light of the subsequent events of World War II), the theoretical foundations of such concepts were established for the first time.

The Nuremberg trials established criminal responsibility for the new concepts of crimes against humanity, war crimes, and crimes against peace. The United Nations General Assembly adopted these principles in 1946, and the International Law Commissions adopted the same principles in 1950.<sup>113</sup> After that, the Universal Declaration of Human Rights, the UN International Covenants, European Convention on Human Rights, American Convention on Human Rights, African Charter on Human and Peoples’ Rights among others, all adopted the concept of individual responsibility in war times.

### **2.1.1 Accountability from the perspective of international law: a modern perspective**

For international law, the State used to be the most important of all subjects; (it should be addressed that Hans Kelsen created the first tie between International and Domestic Law –which was also called Municipal Law-<sup>114</sup>). Even today, the State is one of the key elements of International Law. Under it, the legal community has developed a mechanism that confers responsibility upon the States through treaties with other ones. Post WWII theoretical conceptions gave birth to the International Human Rights,<sup>115</sup> and legal academics supported this creation; García Amador established that International Law did not only protect the rights of the State, but also the rights of non-State actors; therefore, such individuals should be fully incorporated under the protection of contemporary bodies.<sup>116</sup> After the Nuremberg

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<sup>111</sup> *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, Report Presented to the Preliminary Peace Conference (Versailles 29 March 1919, reprinted in 14 AJIL 95, 1920) 115

<sup>112</sup> R. Ratner, J.S. Abrams, J.L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3<sup>rd</sup> edn, Oxford University Press, UK, 2010) 6

<sup>113</sup> *ibid* 16

<sup>114</sup> L.S. Sunga., *Individual Responsibility in International Law for Serious Human Rights Violations*, (Martinus Nijhoff Publishers, Dordrecht 1992) citing Kelsen 1966, 150

<sup>115</sup> *ibid* 139

<sup>116</sup> *Ibid*, citing Garcia Amador 1958, 152

Trials new theoretical issues were conceived as academics, lawyers, and judges started to cross-reference International Humanitarian Law, International Human Rights Law, and Criminal Law itself. Shorts and de Than point out the example of the Anto Furundzija case, who was tried by the International Criminal Tribunal for the Former Yugoslavia (ICTY), and in his appeal both the Appeal Chamber and all sides kept referencing the European Court of Human Rights (ECHR), particularly article 6 which states the right to a fair hearing.<sup>117</sup> This proved how important were the Nuremberg Trials and its aftermath, for the development of contemporary legislations, but also for the incorporation of courts specialized in human rights in different regions of the world.

The theoretical development explained above made a strong impact on all international bodies of law. The International Court Statute established in its article 36 that lawyers who wished to apply for a judge position should be proficient in both criminal law and important “areas of international law and international humanitarian law and the law of human rights...”<sup>118</sup> As it can be seen, human rights became an integral part of criminal law theory, as they have been built upon humanistic principles which (in most cases), do not enter in conflict with political affiliations, so most States have been able to establish them without falling into political turmoil.

Academics state that in order to establish a new individual accountability culture, different bodies of law have been developed.<sup>119</sup> Such bodies constitute the foundation for the purpose of bringing commanders and high rank State public servants to justice. The first one is *International Human Rights Law*, which the same authors explain as the body developed to dignify every human at a world-scale level, not only at a domestic level but also at an international field.<sup>120</sup> The second body is represented by *International Humanitarian Law*, which will monitor and take actions regarding the behaviour shown in an armed conflict by the actors. Such actions include restrictions and protection to different persons taking part in it.<sup>121</sup> The third body is constituted by *International Criminal Law*, which Ratner

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<sup>117</sup> C., de Than & E. Shorts, *International Criminal Law and Human Rights* (Sweet & Maxwell Limited, London 2003) 4

<sup>118</sup> Rome Statute of the International Criminal Court. (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 art 36

<sup>119</sup> R. Ratner, J.S. Abrams, J.L. Bischoff (n 112) 10

<sup>120</sup> *ibid* 10

<sup>121</sup> *ibid* 10

establishes, creates a theoretical conflict. The former reason resides in the fact that such legal bodies refer to the law which attach culpability –from a criminal perspective-, to actors who violate international law. The problem is to clarify how an international body can work to point out individual responsibility.<sup>122</sup> (It should be clarified that Individual Responsibility is a term used exclusively by international legal bodies to point out the commission of human rights atrocities). Two main questions are set questions: 1) which is the easiest path that International Law has for assigning criminal responsibility in a direct way? 2) What are the limits for International Law to oblige the different States to impose sanctions?<sup>123</sup> This is especially troubling for international legal bodies, such as the Inter-American Court of Human Rights, whose influence has been mild in the case of Mexico, establishing responsibilities within the State, but with no concrete actions taken inside the country.

According to Abrams, Ratner and Bischoff the terms “individual responsibility” and “criminal responsibility” tend to be interchanged indiscriminately, when in fact both concepts are extremely related, but, describe different aspects of legal responsibility for violations in human rights. Individual responsibility refers to a subject of responsibility for criminal activity against human rights; such subjects would be individual, group and State responsibility.<sup>124</sup> Criminal responsibility refers to the type of responsibility, which according to both international and domestic law, would be criminal and civil responsibility.<sup>125</sup> In practice, the situation is less rewarding because most of the goals set in the international law scope are relegated to the States; this is why the concept of *civil responsibility* is used, which in fact would be *State responsibility*. Such responsibility operates when a determined State does not meet international or human rights expectations. International law has adopted responsibility for non-state groups as a whole<sup>126</sup> and has accepted the penalization through civil liability by part of the State.

Another basic point is to address the difference between *international crime* and *crime under international law*. The former is a figure used to award

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<sup>122</sup> *ibid* 10

<sup>123</sup> *ibid* 11

<sup>124</sup> *ibid* 15

<sup>125</sup> *ibid*

<sup>126</sup> *ibid*

responsibility to the State in an international legal context; the second concept refers to an individual, also in an international legal context. The International Law Commission states that the individual responsibility being attributed to an individual for an international crime does not necessarily attach responsibility to the State, but neither exhausts the responsibility that this one might have. The conclusion that Sunga established from the classification of the ILC is that the subject matter will determine the relation between the normativity of an international crime and its relation with the individual criminal responsibility.<sup>127</sup> This is especially important when the investigations focus on determining and delimiting responsibilities, which might or might not be shared. During a trial it might be established that a State acted within the limits of international law, while some of its members might be found guilty at an individual level. These concepts date back to the Nuremberg Trials, where –as opposed to the theoretical standards of the time-, it was established that International Law could also act upon individuals, not only States. This also broke with the positivism of classic theories, which created a separation between International Law who only attributed the quality of *subject* to States, and National Law, in which such term only belonged to individuals. It can be seen that the concept of the individual has come a long way after the Nuremberg Trials, but – as opposed to the pre-WWII theoretical conceptions-, the subject of State responsibility did not develop in the same way in the second half of the XX century. As it has been mentioned before, the difficulty of prosecuting an abstract concept such as a “State” has been the most difficult to analyse. The result of debates within legal academy has been the Draft Articles on Responsibility of States for Internationally Wrongful Acts, later adopted by the ICC.

### **2.1.2 The International Military Tribunal**

Following the arrest of prominent Nazi commanders at the end of WWII, the International Military Tribunal in the city of Nuremberg was created especially for the prosecution of war crimes. The IMT Charter was the legal outcome of the newly-established court; it is a decree that was issued on the 8<sup>th</sup> of August of 1945<sup>128</sup>, which contained all the procedures and legal body to carry on with the Nuremberg Trials. The governments that signed the agreement were the United States of America, the (provisional government) of France, United Kingdom and the ex-Union of Soviet Socialist Republics.

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<sup>127</sup> L.S. Sunga (n 114) 132-133

<sup>128</sup> Constitution of the International Military Tribunal (signed 8 August 1945, entered into force 8 August 1945) 82 UNTS 279 art 1

The IMT Charter contains one of the basic principles of command responsibility in its Article 6, which states the types of crimes that will be subjected to individual responsibility. Crimes Against Humanity is the subject matter and it is defined as “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”<sup>129</sup> The Charter also made reforms which erased previous concepts such as command of law, act-of-state immunity, and the defences of superior orders; the former concepts were established in the Control Council Law No. 10 (which prosecuted various Nazis before the IMT and then was picked by the United Nations General Assembly of 1946), and the Charter of the Tokyo Tribunal.<sup>130</sup>

On the subject of individual responsibility, the Nuremberg trials were pioneers in prosecuting war criminals, but they were established as part of global legalism when the General Assembly reaffirmed the concepts used in Nuremberg and the International Law Commission and established them in 1950.<sup>131</sup> After such principles were established, the concept of individual responsibility was adopted on most international and human rights law bodies (and, of course, the International Criminal Court Statute). According to Abrams, Ratner and Bischoff there is still an on-going debate about where can State responsibility end and when does individual responsibility start.<sup>132</sup> Up until the last decades of the XIX century, the States had complete immunity, as it was considered undignified to them to be prosecuted or submitted to external legal decisions. Until then, only individuals were liable be punished for their acts. At the end of the XIX century, the need to develop new mechanisms to attach responsibility to this became a matter of urgency. Later, in the second half of the XX century, agreements like the European Convention on State Immunity (1972), took place.

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<sup>129</sup> Ibid art 6 [c]

<sup>130</sup> R. Ratner, J.S. Abrams, J.L. Bischoff (n 112) 7

<sup>131</sup> Ibid 16

<sup>132</sup> Ibid

### **2.1.3 International Humanitarian law and armed conflicts: is the application of IHL in Mexico's non-international security problem possible?**

Mexico has signed the major international treaties and agreements regarding International Humanitarian Law (IHL) and Human Rights Law.<sup>133</sup> The adaptation of international frameworks to its domestic codes has been subpar though, as they have not evolved or gone through any deep reforms in order to adapt the current military context (the Mexican Constitution and the Federal Criminal Code do not contemplate special provisions for a situation where the armed forces are permanently deployed). If Mexico does not show political will to reform its own legal bodies, then the International legal institutions must take the appropriate measures. Here is an explanation of how IHL and the organisms which apply it work.

The concept of International Humanitarian Law can be described as:

“International rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means

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<sup>133</sup> 2.5. List of international humanitarian law treaties that Mexico has signed, which involve International Humanitarian Law:

International Convention Against the Taking of Hostages (29/07/1987)

- Convention about Rights and Obligations of the States in Case of Civil Conflict (18/03/1929)
- Convention about the imprescriptibility of War Crimes and Crimes of Less Humanity (22/04/2002)
- Geneva Convention I to Improve the Luck of the Sick and Wounded of the Armed Forces in Campaign (23/06/1953)
- Geneva Convention II to Improve the Luck of the Sick, Wounded and the Castaway of the Armed Forces in the Sea (23/06/1953)
- Geneva Convention III related to the Treatment of War Prisoners (23/06/1953)
- Geneva Convention IV related to the Protection of Civilians during Warfare (23/06/1953)
- Geneva Convention Additional Protocol from the 12th of August of 1949, related to the approval of an Additional Distinctive Sign (05/01/2009)
- The Hague Convention Second Protocol of 1954 about the Protection of the Cultural Belonging Protection in Case of Armed Conflict (14/04/2004)

of warfare of their choice or protect persons and property that are, or may be, affected by conflict”.<sup>134</sup>

By its part, the International Committee of the Red Cross (ICRC) establishes that IHL:

...a set of rules which seek for humanitarian reasons to limit the effects of armed conflict. IHL protects persons who are not or who are no longer participating in hostilities and it restricts means and methods of warfare. IHL is also known as the law of war or the law of armed conflict...<sup>135</sup>

Wolfrum and Fleck address that, one of the particularities of IHL is its lack of enforcement from a determinate institution or central body, as such enforcement comes rather by domestic law, and this is its main weakness.<sup>136</sup> Another essential point is that a State can be liable to pay compensation to the affected parties if it violates the provisions of the Protocols, or if the armed forces commit illegal acts against citizens.<sup>137</sup> The downside of these provisions is that “collateral damages” (a term used in the past by the Mexican military commanders, which means the casualties or destruction caused by the State security forces while a clash with organised crime takes place) are not regulated.<sup>138</sup>

#### **2.1.4 The types of conflicts covered by IHL**

Which are the main differences between international and non-international conflicts? For the purpose of analysing the possible application of IHL in Mexico, the frameworks dedicated to domestic conflicts are the centre of this topic, but it is appropriate to address the concept of its international conflicts first. Greenwood states that an armed conflict is considered international “if one state uses force of

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<sup>134</sup> Advisory Service on International Humanitarian Law, “International Humanitarian Law and International Human Rights Law: Similarities and differences” ICRC (January 2003) <<https://www.icrc.org/en/download/file/1402/ihl-and-ihrl.pdf>> accessed 2 June 2016

<sup>135</sup> ICRC National implementation database, “The Domestic Implementation of International Humanitarian Law” (ICRC) <<https://www.icrc.org/eng/assets/files/publications/icrc-002-4028.pdf>> accessed 23 March 2016

<sup>136</sup> R. Wolfrum, D. Fleck, “Enforcement of International Humanitarian Law” in D. Fleck (ed), *The Handbook of International Humanitarian Law* (2<sup>nd</sup> edn, Oxford University Press, Oxford 2010), p. 676.

<sup>137</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, art 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art 91

<sup>138</sup> *ibid* 677-678



arms against another state”.<sup>139</sup> Article 2 paragraph 2 common to the Geneva Conventions 1949 refers to the fact that when a conflict between two states arise and the armed forces are involved, it will be considered an armed conflict even if one of the parties does not acknowledge the existence of a state of war.

It should be addressed at this point that International Humanitarian Law (IHL) has a different application than International Human Rights Law (IHRL),<sup>140</sup> as the first one applies only in armed conflicts, while IHRL is applicable at all times. IHRL are rules that every person is entitled to, whereas the provisions contained in IHL depend on very specific circumstances. Both bodies of rules are applicable in armed conflicts, but IHRL’s scope of application is much broader and covers situations outside the confinement of armed conflicts.

By its part, the legal distinction between international and non-international conflicts has been intricate and difficult to legislate. One of the essential pillars for the regulation of domestic armed conflicts is article 13 of the Additional Protocol II of the Geneva Conventions, which establishes the rules for the protection of victims of non-international conflicts. The International Committee of the Red Cross (ICRC) has commented that the sentence’s “general protection against the dangers arising from military operations” refers to “movements of attack or defence by the armed forces in action”.<sup>141</sup> Additionally, the ICRC states the prohibition of attacks against the civilians “remains valid, even if the adversary has committed breaches”.<sup>142</sup> As Fleck states, there are four principles applicable to all military operations, regardless of the international or domestic context: the distinction between civilian objects and military objectives, and civilians and fighters; the prohibition of unnecessary suffering or superfluous injury, and; the treatment of every person in a humane way without any type of discrimination.<sup>143</sup>

The principles mentioned above could cause confusion in the case of non-international conflicts, where the State security forces are in direct clash with non-

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<sup>139</sup> C. Greenwood, “Scope of Application of Humanitarian Law” in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2<sup>nd</sup> edn, Oxford University Press 2010) 46

<sup>140</sup> Advisory Service on International Human Rights Law (n 134)

<sup>141</sup> International Committee of the Red Cross Commentary of Article 13, Protection of the Civilian Population 1987 [4769]

<sup>142</sup> Ibid [4783]

<sup>143</sup> D. Fleck, “The Law of Non-International Armed Conflicts” in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2<sup>nd</sup> edn, Oxford University Press 2010) 614

State actors, like the Mexican case. The civilian nature of those participating directly in the confrontations has been limited to preserve the logic of the *jus in bello* provisions. As the ICRC has established, “those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts”.<sup>144</sup> The commentary also includes an essential phrase, which is relevant on the light of accusations of extrajudicial executions by members of the armed forces in Mexico, as the Committee establishes that, after the participation of the civilian in the hostilities, “as he no longer presents any danger for the adversary, he may not be attacked; moreover, in case of doubt regarding the status of an individual, he is presumed to be a civilian. Anyone suspected of having taken part in hostilities and deprived of his liberty for this reason will have the benefit of the provisions laid down in Articles 4, 5 and 6”<sup>145</sup> (of the Additional Protocol II), which refer to the fundamental guarantees, the persons whose liberty has been restricted, and the penal prosecutions. The comment from the ICRC enforces the Mexican armed forces to avoid using any kind of inhumane treatment to individuals that are already out of combat. Events such as the Tlatlaya massacre would indicate that the security forces have been violating the *jus in bello* principles of Additional Protocol II.

### **2.1.5 Non-International conflicts**

The legal foundations for non-international issues are common article 3 of the Geneva Conventions (GC), Additional Protocol II, and customary international law. The *Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977 was an amendment made in order to address domestic armed conflicts. This protocol consists of 28 articles which set the concepts of non-international armed conflicts and the rules that apply to the parties involved. Article 1 paragraph 1 recommends its application in conflicts:

...which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its

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<sup>144</sup> International Committee of the Red Cross [ 4789]

<sup>145</sup> *ibid*

territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>146</sup>

With the former definition it can be established that the security strategy issue in Mexico -the numerous reports of civilians murdered and injured-, contains elements that make the application of the legal frameworks of IHL possible, as the organised crime groups have been seizing territories in order to control the distribution and production of drugs. As the government has responded with the use of the army, the armed conflict involves a direct confrontation between State forces and non-State actors.

According to Greenwood, a non-international conflict can be established as:

...a confrontation between the existing governmental authority and groups of persons subordinated to this authority or between different groups none of which acts on behalf of the government, which is carried out by force of arms within national territory and reaches the magnitude of an armed confrontation of civil war<sup>147</sup>

This definition also finds similarities with the development of the armed conflict in Mexico, as the drug cartels are in direct confrontation with the official security forces. As an example of the clarity of the conflict, it should be mentioned that the members of organised crime have even left written messages in the crime scenes directed not only at the federal government, but also at local levels.<sup>148</sup> Unfortunately, Mexico is not a party to Additional Protocol II (only to Protocol I), so this means that the provisions of this protocol cannot be directly applied in this conflict. The purpose is to compare the Mexican security context with the elements of what Additional Protocol II establishes for a conflict to be classified as a non-international armed conflict. This recognition can be useful in order to establish the potential commission of war crimes by members of the armed forces, hence, the importance of addressing the existence of the Protocol.

#### **2.1.6 Application of IHL in domestic armed conflicts**

As it has been established, Common Article 3 of the Geneva Conventions is the most relevant provision to apply in a non-international armed conflict. According

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<sup>146</sup> 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 1 [1]

<sup>147</sup> C. Greenwood (n 139) 54

<sup>148</sup> S. Rincon, "Criminal group kills and leaves message to Mancera; in Rome (neighbourhood), command assaults restaurant" *Sin Embargo* (Mexico City 21 October 2015) <<http://www.sinembargo.mx/21-10-2015/1525416>> accessed 29 February 2016

to the ICRC, this covers “armed conflicts in which one or more non-governmental armed groups are involved”.<sup>149</sup> There is a threshold in the level of confrontation that a situation requires for to be classified as a non-international armed conflict., and Additional Protocol II establishes in its Article 1(2) that no application will be done “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>150</sup>

The *Tadic* case was essential in order to develop concepts that would differentiate armed conflicts from riots and disturbances (1) the intensity of the conflict and (2) the organisation of the parts in conflict. The International Criminal Tribunal for the former Yugoslavia established that “armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.<sup>151</sup> Academics stress that other relevant factors include: the seriousness of attacks, their geographic spread and temporal persistence, the mobilization of government forces, the distribution of weapons and whether the situation has attracted the attention of the UN Security Council.<sup>152</sup> Lawland points almost identical requirements as he establishes that the violence must reach a certain level of intensity and the opposing armed groups must show a minimum degree of organisational level. Such variables must be analysed in their individual context; the intensity of the conflict is measured by the severity and duration of the armed confrontations, the number of State agents involved and the consequences and casualties of the clashes. By its part, the organisation of the opposite criminal groups is measured by their network, their resources and ability to operate. No specific motives of an armed group are needed as a requirement.<sup>153</sup>

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<sup>149</sup> International Committee of the Red Cross Opinion Paper, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (Comite International Geneve, March 2008), 3

<sup>150</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977, art 1(2)

<sup>151</sup> *Prosecutor v Dusko Tadic ada “Dule”* (Judgement) ICTY-94-1 (2 October 1995) [70]

<sup>152</sup> R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge 2014) 279

<sup>153</sup> “Internal conflicts or other situation of violence – what is the difference for victims?” (*ICRC Resource Centre* October)  
<<http://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>> accessed 2 July 2013

It should be pointed that the Geneva Convention does not include the term “civil war” in Article 3; the word to describe such concept is “armed conflict not of an international character”<sup>154</sup>. This term might have been introduced as a way of broadening the possibilities of international humanitarian law to operate, as the first phrase would considerably limit the capabilities of IHL application.

For the second factor (the organisation of the parts in conflict), the ICTY Chamber mentioned in the *Haradinaj* case the existence of a command structure, disciplinary mechanisms, headquarters, control of territory, access to weapons, military style training, ability to plan and carry out military operations, and ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords as elements that encompass the concept of organisation.<sup>155</sup> In the *Lubanga* case, factors such as intimal hierarchy, commando structure, equipment and weapons, ability to plan and carry out military operations, and extent of military involvement were established as elements of organisation.<sup>156</sup>

For his part, Jean Pictet established general considerations that distinguish non-international armed conflicts from internal disturbances and tensions<sup>157</sup>: 1) The Party in confrontation with the government has military force, responsible authorities for their acts, acting in a determinate territory, and being able to respect and ensure respect for the Geneva Convention; 2) That the government is forced to use their armed forces against insurgents which have taken control of parts of the territory and are organised in a military style; 3) that the government recognises the opponents as belligerents, that these ones consider themselves as belligerent, and that the Security Council or UN General Assembly recognises the opponents as threats to international peace, or as committing acts of aggression; 4) Pictet also establishes certain conditions for the insurgents.

It should be addressed that Pictet explained that the insurgent civil authority should agree with the provisions of the Geneva Conventions, which would be a

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<sup>154</sup> 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31/ [1958] ATS No 2 art 3

<sup>155</sup> *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimag* (Judgement) ICTY-04-84 (3 April 2008) [37]-[60]

<sup>156</sup> *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-2842 (ICC 14 March 2012) [537]

<sup>157</sup> Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva International Committee of the Red Cross 1958) 35-36

problem to apply in Mexico, as obviously the drug cartels are not willing to guide their actions by any legal bodies. Nevertheless, the author also establishes that the scope of application of this article should be as wide as possible,<sup>158</sup> and for this reason, not all the conditions mentioned above should necessarily be met. The rules applied to the actors in a non-international conflict can be said to have human protection as their priority, being that the main goal is to guarantee that every person involved in either an active or a passive way gets an adequate, humane and dignified treatment.<sup>159</sup> Lawland states that even enemies that have been wounded in the conflict must be attended in the same way as the other actors.<sup>160</sup>

Rowe states that in non-international conflicts the armed forces are fighting against civilians; it is unlikely for these armed groups to have military training, so international humanitarian law would be a topic unknown to them.<sup>161</sup> The Mexican drug cartel called *Los Zetas*, however, contradicts Rowe's theory, as the majority of their members consist of ex-members of special troops forces<sup>162</sup>, a condition that makes them one of the deadliest and most successful criminal groups in existence (their leader –Miguel Angel Treviño Morales, known as the “Z-40”-, was captured by the marines on the 16<sup>th</sup> of July of 2013<sup>163</sup>, but at the time of writing, it is still unknown if this will have an effect on the cartel's structure and operation). This is one of the main concerns about the high number of soldiers deserting every year, it has been easy for cartels to recruit them with a promise of better wages and more powerful positions.

The States have a major responsibility to conduct investigations and control the military's actions in the case of a non-international conflict. The Additional Protocol I of the GC establishes in its article 87 the duty of military commanders to

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<sup>158</sup> Ibid 36

<sup>159</sup> Additional Protocol II, art 4(2)(a)

<sup>160</sup> 1949 Geneva Convention, arts 12-13[2]

<sup>161</sup> P. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, Cambridge 2006) 168

<sup>162</sup> K. Stastna, “The cartels behind Mexico's drug war” (*CBC News* August 28 2011) <http://www.cbc.ca/news/world/story/2011/08/28/f-mexico-drug-cartels.html>, accessed 10 April 2013

<sup>163</sup> AP, “Mexico captures Zetas leader Miguel Angel Treviño Morales, known as Z-40” (*The Guardian* 16 July 2013) <http://www.guardian.co.uk/world/2013/jul/16/mexico-drugs-trade>, accessed 18 July 2013

prevent, suppress and report any breaches of the Conventions.<sup>164</sup> Rowe states that such a role will belong to the domestic legal bodies, including military law. The same author states that the rank of a military might be a key factor for limiting the investigation of expanding into other actors, using the concepts for command responsibility.<sup>165</sup> The Mexican case is more extreme, as it shows a complete absence of a professional criminal code for the armed forces in times of non-international conflict.

To reinforce the former statement, Rowe enlists a number of factors that present obstacles for domestic law to serve as the immediate medium of prosecution.<sup>166</sup> Among various points, the right of a State to reform or amend the law is perfectly accepted regardless of the stage of the conflict (international humanitarian law cannot go through any amendments during the course of such conflict). Depending on the situations that are presented during the course of the armed issue, the State forces might be willing to engage in conducts that would have been considered inappropriate at another stage of the conflict. Desperation from the State in order to end the conflict with a favourable note can cause the forces to relegate the respect to human rights to a second place. This is consistent with Calderón's rhetoric when he stated that the fatalities of innocent civilians were "collateral damages".<sup>167</sup> Another factor that Rowe establishes is the domestic codification, which may contain provisions which give impunity to the military for all its actions, or

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<sup>164</sup> 1949 Geneva Conventions Protocol I art 87

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

<sup>165</sup> P. Rowe (n 161)

<sup>166</sup> Ibid 177-178

<sup>167</sup> R. Desachy Severino "Felipe Calderón, the administration of death" *Periódico de Puebla* (Puebla, 12 November 2012) <<http://periodicodepuebla.com.mx/component/content/article/28-desachy-/9334-felipe-calderon-el-sexenio-de-la-muerte>> accessed 15 September 2014

it might cause a conflict between domestic and international legislation; it will all depend on the extensive powers given at a national level. The final point made by the author is the difficulty for victims and witnesses to recognize their offenders due to them being camouflaged in uniforms.<sup>168</sup> This last factor might be debatable, as part of the investigation should focus on getting access to all information relating to work shifts, names and positions of every military personnel involved in a certain space and time, but there's no denying that most witnesses tend to be very intimidated when they have to face military personnel. This issue is another obligation for the Mexican State to apply reforms that will give all witnesses a minimum of security.

Rowe establishes that States whose military authorities have the monopoly when investigating their own personnel, tend to have more problems for prosecution and access to victims' justice. He quotes that Inter-American Commission by establishing that most suspects of sexual abuse or other violations are rarely convicted.<sup>169</sup> It seems that military impunity due to the complete military legal control in Latin America is a common theme. This is a point worth taking into account when reforming domestic codes; it is necessary to establish mechanisms for the victims to access international humanitarian law in a safer and easier way. In the couple of cases of military personnel being tried that were analysed for the first chapter, all of them were still being "investigated". This makes it virtually impossible for the victim to access international justice because the domestic paths have still not been exhausted as the trial has not started even years after the official investigation started. There is no way for the ICRC to monitor the procedure in any way, because the file is kept in military desks as classified information (even though civilian criminal trials are public, except for kidnapping and sexual assault, the military has not agreed to make public any information, to the extent that not even the victims have access to any information).

At a domestic level in Mexico, the Military Justice Code (MJC) has explicitly stated in its article 78 that the Military Public Ministry (the institution in charge of investigations), will collect all the needed data to certify the existence of a crime and the possible responsibility of the suspects. The problem with the MJC is that the crimes contemplated in it do not cover human rights violations, which was what triggered the recent reform of article 57.

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<sup>168</sup> P. Rowe (n 161) 177

<sup>169</sup> *ibid* 178



### **2.1.7 How has Mexico complied with IHL?**

In 2009, Felipe Calderon issued a presidential decree created the Interministerial Committee on International Humanitarian Law (CIDIH).<sup>170</sup> Its principal mission is to “disseminate and promote respect for international humanitarian law rules, principles and institutions and further the national implementation of Mexico’s commitments in this respect under the international treaties to which it is a party”.<sup>171</sup> Regardless of the creation of this institution, the abuse of human rights by members of the armed forces has not seen a change in policies, and very few information can be found on the activities of the CIDIH.

In order to address non-international armed conflicts according to the 1977 Additional Protocols, the CIDIH has established as one of its main objectives “to review the definition of offences contained in the Federal Criminal Code, in light of the [1998] Rome Statute of the International Criminal Court, the four Geneva Conventions of 1949 and their Additional Protocol I [of 1977], with a view to bringing them into line with international standards.”<sup>172</sup>

On the subject of the use of force by Mexican law enforcement officials, the president of the ICRC, Mr Peter Maurer, established that the protection of persons and the rule of law needs to be essential when the military forces take part in security tasks, and concluded stating that the ICRC has been cooperating with the Mexican armed forces and security bodies in order to adapt legal standards of human rights to the procedures, doctrines and training of the security institutions.<sup>173</sup>

### **2.1.8 The concept of war crimes: is it possible to apply in the Mexican security conflict?**

Sanctions are applied to serious violations of international humanitarian law; such offenses are called *war crimes*. The actors who break the law shall be penalized by the domestic law, but in certain cases criminals will also be prosecuted by the International Criminal Court. At a domestic level in Mexico, there has always

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<sup>170</sup> “Agreement that permanently creates the Interministerial Committee on International Humanitarian Law” Official Diary of the Federation 19 August 2009

<sup>171</sup> *ibid* art 1 (translation by Mariana Salazar Alborno)

<sup>172</sup> UNGA Mexico Report on the Status of the 1977 Protocols Additional to the Geneva Conventions of 1949, 29 September 2010 sect 2

<sup>173</sup> P Maurer, “Challenges to International Humanitarian Law and Humanitarian Action” *UNAM Law School* (Mexico City, 7 April 2015) <<https://www.icrc.org/en/document/mexico-challenges-international-humanitarian-law-and-humanitarian-action>> accessed 15 February 2016

been a strong reluctance of political actors and military commanders of subjecting their personnel to international scrutiny (as evidenced in the last chapter of this research) Finally, in order to determine the classification of a conflict, the ICRC will engage in a dialogue with those under the threat of the conflict; subsequently, they will perform an analysis with the points mentioned previously (the requirements for a situation to qualify for a non-international armed conflict), and finally make the classification through a public statement.<sup>174</sup> Article 5 of the Rome Statute states that the ICC has jurisdiction to prosecute war criminals under the conditions defined under articles 121 and 123.<sup>175</sup> It should be noted that the investigation for war crimes will belong to the State, being that international humanitarian law will only work monitoring the conflict. Regarding the concept of war crimes, the permanent representative of Mexico established in a UN Security Council on the protection of civilians in armed conflict the following:

We should bear in mind that violations of the norms and basic principles of international humanitarian law constitute war crimes, and that it is the Member States who bear the primary responsibility to investigate and prosecute those allegedly responsible for them. ... Should States lack the capacity or willingness to prosecute alleged perpetrators, the International Criminal Court has jurisdiction to take up such crimes, as set forth in the Rome Statute [1998 ICC Statute].<sup>176</sup>

The most precise list of war crimes in domestic conflicts is –according to Ratner, Abrams and Bischoff-, the Rome Statute of the ICC, which is still shorter than its inter-state counterpart.<sup>177</sup> Its article 8 is the one which refers to war crimes, and the relevant part of the provision for the Mexican conflict is its subparts c, d, e and f, which refer to the violations of common article 3 of the Geneva Conventions and other violations for the situations of non-international conflict. It should be noted that article 8 establishes that such provisions will not be applied in situations of internal disturbances and tensions.

Are there any general principles in order to regulate the conduct of the State security forces in domestic conflicts? In the *Prosecutor v Tadic jurisdiction decision*, the Appeals Chamber referred to the German Military Manual of 1992, which establishes that: “Members of the German army, like their Allies, shall comply with

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<sup>174</sup> ICRC (n 134)

<sup>175</sup> Rome Statute of the International Criminal Court art 5

<sup>176</sup> UNSC “Mexico, Statement by the permanent representative before the UN Security Council” 6151th meeting, UN Doc S/PV.6151 (2009) 11

<sup>177</sup> R. Ratner, J.S. Abrams, J.L. Bischoff (n 112) 102

the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts.”<sup>178</sup> The purpose of the Chamber with this reference was to establish general principles to regulate hostilities in non-international conflicts are also carried in military domestic manuals.<sup>179</sup> The Appeals Chamber also established that it is the right of the parties in conflict to limit the scope of the right “to adopt means of injuring the enemy”.<sup>180</sup> There is also the need to set a logical standard of what is acceptable at a domestic level, regardless of the internal regulations at the time of a domestic conflict, as the Chamber also stated that “what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife”.<sup>181</sup> This rationale implies that states need to regulate their standards of confronting internal enemies in harmony with the international standards.

In the *Tadic* case, the defence agreed that the provisions entailed on international conflicts do not “entail individual criminal responsibility when breaches are committed in internal armed conflicts”.<sup>182</sup> The Chamber established that, although common article 3 of the Geneva Conventions did not make a direct reference to criminal liability when the provisions are violated, the International Military Tribunal at Nuremberg established that “a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches”.<sup>183</sup> What does the concept of individual criminal responsibility in respect to war crimes mean? Chuter establishes that the “individual” can be either a military commander or a civilian.<sup>184</sup> The way of proving such responsibility is highly complicated, as the same author addresses, in the case of war crimes, the range and the depth of the factual material which the prosecutor needs to prove are much greater than in domestic trials.<sup>185</sup> Since the Rome Statute was concluded, the UN

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<sup>178</sup> Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320065, at para. 211 (unofficial translation)

<sup>179</sup> *Prosecutor v Tadic*, (n 147) [118]

<sup>180</sup> *Prosecutor v Tadic*, (n 147) [110]

<sup>181</sup> *Prosecutor v Tadic* (n 14) [119]

<sup>182</sup> *Prosecutor v Tadic* (n 147) [128]

<sup>183</sup> *ibid*

<sup>184</sup> D. Chuter, *War Crimes: Confronting Atrocity in the Modern World* (Lynne Rienner Publishers, Colorado, 2003) 74

<sup>185</sup> *Ibid* 211

Security Council has provided with more material on individual accountability in domestic conflicts, as on the situation on Sierra Leone (SC res 1315), they established that “persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice”.<sup>186</sup>

The principle of complementarity is another issue that limits international prosecutors, as the International Criminal Court (ICC), must first analyse and decide if the domestic prosecutors and courts are conducting an investigation and posterior prosecution in a proper way.<sup>187</sup> This principle intends to give the ICC the quality of a “last resort” court, which will supplement, but not suppress domestic jurisdiction,<sup>188</sup> as the Rome Statute establishes the responsibility of States to exercise their own jurisdiction over international crimes.<sup>189</sup> The rationale is that domestic courts have better access to the evidence and keep control of the procedures in direct way. The Appeals Chamber in the *Prosecutor v German Katanga and Mathieu Ngudjolo Chui* case established that the principle of complementarity would operate in a State that has been proven to be unable or unwilling to investigate and prosecute.<sup>190</sup> This means that as long as the domestic jurisdiction is investigating or prosecuting the case, unless the conditions mentioned previously appear.<sup>191</sup>

### **2.1.9 Customary International Law**

The importance of this area of law in this research relies in the fact that IHL, and various other legal sources -such as the Convention against Torture- are sources of customary law. Its use goes back centuries ago, as philosophy and religion shaped the practices of international law, and customary laws made for warfare have been part of the grounds for modern international legal frameworks.<sup>192</sup>

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<sup>186</sup> UNSC Res 1315 ( 14 August 2000) UN Doc S/RES/1315, p. 1.

<sup>187</sup> D Chuter (n 184) 213

<sup>188</sup> R Cryer, H Friman, D Robinson, E Wilmshurst (n 152) 154

<sup>189</sup> Rome Statute of the International Criminal Court art 1

<sup>190</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07 ( 25 September 2009) [59]

<sup>191</sup> R Cryer, H Friman, D Robinson, E Wilmshurst (n 152) 154

<sup>192</sup> C Greenwood (n 139) 15

Customary law is shaped by customs and practices, and as Judge Read established on the *Fisheries case*, it can be considered as “the generalization of the practice of States”,<sup>193</sup> or as the International Court of Justice established in the *Libya v Malta case*, customary international law is found “primarily in the actual practice and *opinion juris* of States”.<sup>194</sup> Postema establishes the values that are used to understand the concept of “custom”, these being: behaviour or usage (*usus*) plus belief or conviction of necessity (*opinion juris sive necessitates*).<sup>195</sup> As Steinhardt addresses, both common law and civil systems incorporate customary international law as domestic law (here lays the importance of the Mexican legal system to comply with the current international standards on the use of force, and the prevention of practices like torture by their officers).<sup>196</sup>

There is an essential role that customary law plays in modern legal systems; Perreau-Saussine and Murphy state that the growth and application of customary law in cases where the legislators have left a gap to fill needs to be developed as well as new frameworks.<sup>197</sup> They also establish that the written law is unable to give “exhaustive directions on its own interpretation, (so) customary rules and practice inevitable guide judicial interpretation”.<sup>198</sup>

#### **2.1.10 Human rights law applied in non-international armed conflicts**

The rights covered in the Universal Declaration of Human Rights (UDHR) are considered to be part of customary law by an increasing number of academics in recent times.<sup>199</sup> The principle of sovereignty of a state which is found in article 2(7) of the UN Charter establishes that no State can intrude in other State’s domestic affairs, but in the subject of human rights, reinterpretation has been

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<sup>193</sup> *Fisheries case*, ICJ December 18th 1951 (ICJ Reports 1951) 79

<sup>194</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment* (ICJ Reports 1985) 27

<sup>195</sup> A. Perreau-Saussine and J.B. Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, UK 2007) citing Postema, 279

<sup>196</sup> R Steinhardt, “The Role of Domestic Courts in Enforcing International Human Rights Law” in H. Hannum (ed) , *Guide to International Human Rights Practice* (4<sup>th</sup> edn, Transnational Publishers Lc, NY 2004) 272

<sup>197</sup> A. Perreau-Saussine and J. B. Murphy (n 195) 1

<sup>198</sup> *ibid* 10

<sup>199</sup> See N.S. Rodley, “Human Rights and Humanitarian Intervention: the Case Law of the World Court” (1989) 38 *International and Comparative Law Quarterly* 321, 333; L. Henkin, *The Age of Rights* (New York: Columbia University, 1990) 19

carried on, in order to have international surveillance on domestic human rights issues.<sup>200</sup>

How does a State comply with the customary application of human rights law? The Third Restatement of the Foreign Relations Law of the United States establishes that adhering to the UN Charter and accepting that UDHR ways of accepting such rules; other ways of complying with it are participating in the debates that include the condemnation of States that violate law.<sup>201</sup> De Schutter states that the ICJ has encouraged the recognition of the UDHR as a source of legal obligations, as this framework has been implemented at various degrees by many legal bills all over the world.<sup>202</sup> Steinhardt establishes that in most legal systems (Mexico is an example), the judicial system is forced to incorporate or interpret their domestic frameworks in accordance to international law, both in conventional or customary forms. This author also establishes that the interpretative power of the judges also plays an essential role for a State to comply with international law, as they can fill the gaps and ambiguity of international human rights provisions.<sup>203</sup>

Malcolm and Evans also establish that the UDRH was conceived as “a common standard of achievement for all peoples and all nations”, instead of being a set of legal obligations.<sup>204</sup> Despite this classification, the International Court of Justice set a strong precedent with the *Barcelona Traction* case, as it was established that the set of rules and principles on human rights, should be “obligations of a State towards the international community as a whole”.<sup>205</sup>

The purpose of potentially applying human rights law in the Mexican security conflict would be due to the numerous complaints about human rights abuses by members of the security forces, in particular the military. Is there a way to make a

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<sup>200</sup> M. Shaw, *International Law* (7<sup>th</sup> edn, Cambridge University Press, UK 2014) 199

<sup>201</sup> American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (American Law Institute Publishers, St. Paul, Minnesota, 1987) section 701 no 2

<sup>202</sup> O. De Schutter, *International Human Rights Law* (Cambridge University Press, UK 2010) 53, 55.

<sup>203</sup> R Steinhardt (n 196) 274

<sup>204</sup> M.D. Evans, R. Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press, Oxford 1998) 63

<sup>205</sup> *Barcelona Traction, Light and Power Company, Limited*, Judgment, (ICJ Reports 1970) [33]

State liable for the violations of their officers? In the *Sarma v Sri Lanka* case, the Human Rights Committee established that the violations of soldiers or other officers, who make use of their position or authority to execute an unlawful act even when the subject is acting beyond his authority, will be attributed to the State.<sup>206</sup> The problem with making the Mexican State liable for the violation of international law, is that, as section 702 of the Third Restatement of the Foreign Relations Law of the United States establish, this violation must be part of a State policy,<sup>207</sup> which is in congruence with the definition of Crimes against Humanity.

#### **2.1.11 The Convention against Torture and its application in the Mexican context**

The military in Mexico has been accused of practices that involve torture;<sup>208</sup> the Special Rapporteur –Juan E. Méndez- on torture and other cruel, inhuman or degrading treatment or punishment made his last visit to Mexico on April-May of 2014. In his report he concluded that there was evidence of the involvement of both military and civilian forces in acts of torture and ill-treatment in the stage of arrest and detention before the suspects were brought before a judge.<sup>209</sup> Méndez also established legislative recommendations, which included the reforming of the Military Justice Code (which the Mexican State complied on 2015), the derogation of “arraigo” (the 40-day period of detention for suspects of organised crime, which is still legal in the Mexican Constitution until the moment of this writing), and invited Mexico to reform the use of force in accordance to international principles.<sup>210</sup>

Torture is considered one of the most serious breaches of law in contemporary frameworks, both traditional and customary. First, the most widely accepted concept of torture should be established; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’s article 1(1)<sup>211</sup>

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<sup>206</sup> Human Rights Committee (HRC), Communication No. 950/2000 : Human Rights Committee : Decision adopted by the Committee at its 110th session (25 October 199), 16 July 2003, CCPR/C/78/D/950/2000 [8.5]

<sup>207</sup> American Law Institute (n 201) sect 702

<sup>208</sup> Human Rights Watch (n 4)

<sup>209</sup> UNGA “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Mexico” UNHR UN 38<sup>th</sup> session (29 December 2014) A/HRC/28/68/Add.3 [76]

<sup>210</sup> *ibid* [81 a-g]

<sup>211</sup> Article 1 (1): For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a

was referred by the ICTY as the one that contained both the definitions established in the Declaration on Torture, and the Inter-American Convention, and represented customary international law.<sup>212</sup> To understand the importance of this crime in modern legal culture, the judgement of the ICTY in the *Prosecutor v Anto Furundzija* case needs to be referred. The Court established that the States have the obligation to eradicate any practices of torture, and these attempts to legislate such crime have caused both treaties and customary rules on torture to have a highly important status in the international frameworks, being as relevant as crimes like genocide or slavery.<sup>213</sup> In this judgement the *Filartiga v Pena-Irala* case was also referenced, as the USA Court stated that “the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind”.<sup>214</sup> The ICTY continued stating in the *Furundzija* case that the practice of torture has gained the status of *jus cogens* (compelling law).<sup>215</sup> As Klein addresses, *jus cogens* “embraces customary laws considered binding on all nations...and is derived from values taken to be fundamental by the international community rather than from the fortuitous or self-interested choices of nations”.<sup>216</sup>

The *Furundzija* case also established notions about the effects of torture as a peremptory norm both at inter-State and individual levels. In the first case “it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture”,<sup>217</sup> and at an individual level (criminal liability), “it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who

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confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

<sup>212</sup> *The Prosecutor v Zejnil Delalic, Zdravko Mucic (aka “PAVO”), Hazim Delic and Esad Landzo (aka ZENGA)* (Judgement) ICTY-96-21-A (20 February 2001) [459]

<sup>213</sup> *Prosecutor v Anto Furundzija* (Judgement) ICTY-95-17/1-T (10 December 1998) [147]

<sup>214</sup> *Filartiga v Pena-Irala*, 630 F. 2nd 876 (2d Cir) US (1980)

<sup>215</sup> *Prosecutor v Anto Furundzija* (n 213) [153]

<sup>216</sup> A. Klein, “A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts” (1988) 13 *Yale Journal of International Law* 332, 350-351

<sup>217</sup> *Prosecutor v Anto Furundzija* (n 213) [155]



are present in a territory under its jurisdiction".<sup>218</sup> The USA Court of Appeals also established the importance of torture as a *jus cogens* law in the *Siederman Blake v Argentina* case, as it concluded that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *ius cogens*".<sup>219</sup>

The international legal scope on this crime has developed important frameworks, which as a consequence has influenced the modern Mexican legislation. The most important international legal body dedicated to this topic is the Convention Against Torture (CAT); this convention was created by the United Nations Committee in order to expand the principles contained in article 5 of the Universal Declaration of Human Rights (UDRH) and article 7 of the International Covenant on Civil and Political Rights, which establish that "no one shall be subjected to torture or to other cruel, inhuman or degrading treatment or punishment". Article 1 of the CAT defines the concept,<sup>220</sup> and article 4 establishes the obligation of the States to regulate the penalties for torture in their domestic frameworks. The convention is the base for the standards that every State Party should adopt and observe regarding torture issues. It should also be pointed out that the CAT is considered part of the customary international law.

Mexico signed this convention on the 3rd of January of 1986, and it started to be applied on the 26th of June of 1987. In 1991, the federal congress developed the Federal Act for the Prevention and Punishment of Torture (FAPPT), which defined the concept and established the penalties for who commits this crime. In 2012, the UN Committee against Torture developed a report on their concluding observations on the combined fifth and sixth periodic reports on Mexico; in this it was established among other considerations that the reports of torture had increased alarmingly since the start of the joint security operation between the civilian security bodies and the armed forces. On the concept mentioned above, the

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<sup>218</sup> *Ibid* [156]

<sup>219</sup> *Siderman de Blake v The Republic of Argentina* 965 F.2d 699 (9<sup>th</sup> Cir) US (1992) [717]

<sup>220</sup> Article 1(1): 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

committee recommended that all members of security forces should be identified; that the persons held in official custody are clearly registered and monitored; and that legal assistance is given to them in order to challenge the detention. It should be noted that although the UN Committee established that the Mexican State should reform article 3 of the FAPPT, in order to add the elements contained in article 1 of the CAT, these elements were already contained in article 5.<sup>221</sup>

Mexico has issued periodic reports to the Committee against Torture, which include the amendments to the Federal Code of Criminal Procedure<sup>222</sup> and the Federal Act to Prevent and Punish Torture of 1991.<sup>223</sup> Even though the Committee published their conclusions in 2012, the Mexican State has not shown signs of developing strong mechanisms of accountability for the officials that commit or order acts of torture. Amnesty International (AI) documented in 2015 the conclusions of a campaign started in 2014, and in which Mexico has one of the countries in which they focused. The results showed that the country continued to suffer from an endemic spread of torture by the security forces; and even though AI established that the legislative power was developing a draft for a new framework (General Law on Torture), they stated that most important thing that the State has to work on, are the sources of impunity and the strengthening of monitoring mechanisms in order to implement the frameworks.

Finally, how is the nature of torture as a crime liable to individual application? Ratner, Abrams and Bischoff have stated that, due to the *jus cogens* nature of this crime, the adherence of the majority of States to the CAT, and the non-derogability of the prohibition of torture, customary international law gives torture the nature of a freestanding international crime.<sup>224</sup>

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<sup>221</sup> "The penalties established in the last article will be applied to the public servant.....that persuades, compels, or authorises a third party of uses him to infringe pain or severe suffering to a person, whether these are physical or physical, or do not attempt to stop such suffering or pain to a person who is under his custody." Federal Act for the Prevention and Punishment of Torture 1994. Art 5

<sup>222</sup> UNCHR "Mexico, Forth periodic report to the Committee against Torture" (2005) UN Doc. CRC/C/55/Add. 12 [132]: "The Federal Code of Criminal Procedure was reformed in 1994 to include torture in the category of serious offences; it was also established that "the authorities shall in no event and on no account use solitary confinement, intimidation or torture in order to obtain statements from a suspect or for any other purpose" (art. 289)."

<sup>223</sup> *ibid* [25]0[-26]

<sup>224</sup> R. Ratner, J.S. Abrams, J.L. Bischoff (n 112) 122

### **2.1.12 Can the International Criminal Court (ICC) intervene in Mexico for the possible commission of Crimes against Humanity?**

The ICC works as a complement to the domestic criminal court systems; its function consists in prosecuting crimes that States by themselves don't want to prosecute or are not able to do it. For this reason, States need to make sure that all obstacles for the ICC to intervene in a conflict are removed from domestic legal bodies.

The concept of crimes against humanity constitutes an essential addition to this chapter, as the current situation between the Mexican armed forces and civil society has reached a point of emergency since the Human Rights National and States Commissions started to receive dozens of complains from abuses by the armed forces every year (official reports of the Human Rights National Committee in Mexico establish that 143 complaints against the armed forces have been lodged from 2007-2015<sup>225</sup>). This concept embraces the protection of civilians as its main focus, and another essential point is the possibility of submitting members of the State to prosecution for the commission of this crime.

The Rome Statute of the International Criminal Court establishes the concept of Crimes against Humanity (CaH) in its article 7 as any of the "acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".<sup>226</sup> This definition is important to refer in the Mexican armed conflict, as the crimes documented where the military are suspected be involved are the following: murder, torture, rape, enforced disappearance of persons, and other inhumane acts causing suffering or serious bodily or mental injury. In theory, these conducts do fall into the category of CaH, according to article 7(1), (a)(b)(f)(g)(i) of the Rome Statute.

The current governmental security strategy started in December of 2006, so in a hypothetical prosecution the defendants would not have the possibility of invoking the non-applicability of these Statutes because of the previously mentioned dates of adherence and ratification (Mexico signed the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity in the

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<sup>225</sup> Mexican National Commission on Human Rights ( n 14)

<sup>226</sup> Rome Statute of the International Criminal Court, art 7

2nd of July of 1969, ratifying it on the 15<sup>th</sup> of March of 2002<sup>227</sup>). The former explanation is relevant because the Mexican State has attempted to refer the principle of non-retroactivity of treaties (basing their argument on Article 28 of the Vienna Convention on the Law of Treaties)<sup>228</sup>, in order to contest an international court before, concretely on the *Radilla-Pacheco v Mexico* case, in which the Inter-American Court of Human Rights replied and established that the subject matter in which the accusation was based on (forced disappearance of persons), had a continuous or permanent nature, therefore it persisted after the date of Mexico's adhesion to the American Convention. Due to the former, such crime "may generate international obligations for the State Party, without this implying a violation to the principle of non-retroactivity of treaties".<sup>229</sup>

To continue with the contemporary international legal foundations, it is also important to state that the International Criminal Tribunal for the Former Yugoslavia establishes in its article 5 the need for human rights abuses to be committed in the context of an armed conflict to be categorized as Crimes Against Humanity<sup>230</sup>, but it should be pointed that under customary international law this element is not required. For the purpose of establishing the possibility of creating a nexus between the human rights abuses which are attributed to military personnel in Mexico and the concept of crimes against humanity, the main points composing such concept must be analysed. Ratner analyses Article 7 by establishing the existence of two basic elements in the articles description, these ones being "humanity" and "against a....population".<sup>231</sup> We must clarify the current theoretical conclusions and also current jurisprudence in order to approach the concept to the Mexican context.

During the intervention of the International Criminal Court in the Republic of Kenya, two important considerations were established: the Court stated that an

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<sup>227</sup> United Nations Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted 26 November 1968, entered into force 11 November 1970) 754 UNTS 73; 18 ILM 68 (1979)

<sup>228</sup> Article 28 of the Vienna Convention on the Law of Treaties states that: "unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with regard to that party."

<sup>229</sup> *Radilla Pacheco v. Mexico* (Judgement) Inter-American Court of Human Rights serie C no 209 (23 November 2009) [22]

<sup>230</sup> International Criminal Tribunal for the Former Yugoslavia 2009 art 5

<sup>231</sup> R. Ratner, J.S. Abrams, J.L. Bischoff (n 112) 58

attack is not limited to the ones of a military nature<sup>232</sup>, but to any type of attack to a civilian population, which should be distinguished by various factors such as ethnicity, nationality and other features, although the article cannot be referred when random citizens are the victims. The Pre-Trial Chamber II of the ICC stated that civilian population must be the primary object of target,<sup>233</sup> which opens one channel for the application of such articles to the Mexican situation, as drug cartel members are the official target of the State, and the Human Rights Commission has gathered various evidence of attacks directed against citizens whose connection with organised crime has not been proved.

In the judgement of the *Prosecutor vs. Jean-Paul Akayesu* case, the Chamber I established that “Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause”.<sup>234</sup> Another point to take into consideration is that the footnote 6 from the article 7(2) (a) of the Rome Statute establishes that this attack towards the civilian population must be part of a State active policy<sup>235</sup>, which in principle would fit properly with the Mexican government issue of the current security strategy, a policy which was actively started by the Felipe Calderón administration and is actively continued by the Enrique Peña Nieto administration. It is important to notice that the human rights abuses in Mexico have been committed while the soldiers are performing security duties as part of the government strategy.

The former statement was supported by the former Defence Secretary, Guillermo Galván Galván, when he stated the following “Despite the deaths of civilians –children, young students and adults-, in the confrontations between the armed forces and organised crime, the strategy will be maintained, (as) they are

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<sup>232</sup> “Elements of Crimes, Introduction to Article 7 of the Statute” para 3, cited in “Pre-Trial Chamber II, Situation in the Republic of Kenya” (International Criminal Court Public Document) 33

<sup>233</sup> *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424 (15 June 2009) [582]

77. See also *Prosecutor v. Kunarac et al.* Case No. ICTY-96-23 & ICTY-96-23/1-A, Appeal Judgement 12 June 2002 [91]-[92]; *Prosecutor v Stakic*, Case ICTY-97-24-T, Judgement 31 July 2003 [624]; *Prosecutor v Vasiljevic* ICTY-98-32-T, Judgement 29 November 2002 [33]

<sup>234</sup> *The Prosecutor v Jean-Paul Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) [582]

<sup>235</sup> *Ibid* (n 137) 35

lamentable collateral damage”.<sup>236</sup> It is important to note that this was not said during an informal meeting or an interview, but in the Chamber of Senators, in an official appearance before the senators of all political parties as part of the National Security Cabinet hearings. Galván seems to have justified the murders of civilians by inferring that the State’s main objective is to confront members of organised crime, but it is important to notice that recent judgements have clearly stated that this is not an excuse for the commission of human rights abuses. The former point is established by the Appeals Chamber of the Special Court for Sierra Leone in *The Prosecutor vs. Fofana and Dondewa* case; the Appeals Chamber established that international humanitarian law must apply to every part involved in an armed conflict, regardless of who the “aggressor” is. Therefore, *the attacks against a civilian population can be characterised as crimes against humanity even if the “ultimate objective of the fighting force was legitimate and/or aimed at responding to aggressors”*.<sup>237</sup> This last argument would make Galván’s argument unjustifiable at the eyes of an international criminal court, as the human rights abuses in Mexico have not been part of the structure of the governmental security strategy, but they have been committed by the military personnel while performing security tasks that the State policy orders.

Must the attack on the civilian population be clearly stated in the State’s policy? The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 made some clear definitions in the judgement against Tihomir Blaskic, stating that the attacks might be a consequence of the events, among them: “the general historical circumstances and the overall political background against which the criminal acts are set”; “the establishment and implementation of autonomous military structures”; “the mobilisation of armed forces”; “temporally and geographically repeated and co-ordinated military offensives”; and “the scale of the acts of violence perpetrated –in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites”.<sup>238</sup> The former stream of events have been proven to form part of the security strategy

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<sup>236</sup> V. Ballinas, “Deaths of civilians in combat against crime, “collateral damages”: Galván” *La Jornada* (Mexico City 13 April 2011)  
<http://www.jornada.unam.mx/2010/04/13/politica/005n1pol> accessed 15 February 2014

<sup>237</sup> *Prosecutor v Moinina Fofana* (Judgement) SCSL-2003-11-A (28 May 2008) [247]

<sup>238</sup> *Prosecutor v Blaskic* (Judgement) ICTY-95-14-T (3 March 2000) [204]

in Mexico, which has deployed the army for an unknown time through a presidential decree which created a special enforcement body to help civilian security forces.

Another highly important point would be the term “widespread attack”. What is the definition of the Pre-Trial Chamber II about such concept? It has been established by academics that an attack can be considered as widespread when it encompasses “the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”<sup>239</sup> Can the human rights abuses in Mexico be considered a widespread attack? In November of 2011, just a year before ex-president Felipe Calderón’s presidential term finished, Human Rights Watch (HRW) issued a report named “Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico’s War on Drugs”. Such report established that Mexican military personnel have been responsible for human rights violations, which included 39 disappearances, 24 extrajudicial killings (it is important to point out that death penalty is forbidden in Mexico, so the term “extrajudicial” is irrelevant from a domestic perspective, but not to international law), and more than 170 cases of torture since the year 2006 (in a HRW article that incidentally, uses the term “widespread” in its title).<sup>240</sup> The same report states that almost no case has been properly investigated; the former statement was concluded after HRW carried a deep research in five of the most affected states in Mexico, where the military had been deployed with the intention of counterattacking the drug cartels. The officials from the Human Rights Commissions stated that there was a clear contrast between the evidence they had gathered and the number of cases being investigated by the official prosecutors (Guerrero is an extreme example, were between 2007 and 2010 there was not a single investigation carried on, even though the local Human Rights Commission had received 52 complaints<sup>241</sup>).

Such report also states that both military and civilian prosecutors have downgraded some of the crimes being denounced, such as the case of torture., as it was stated that most of the criminal files on the official website of the National Defence Secretary listed the crime being investigated as an “abuse of authority”,

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<sup>239</sup>.International Criminal Law & Practice Training Materials, *Crimes Against Humanity* (EU 2011) 12

<sup>240</sup> “Mexico: Widespread Rights Abuses in “War on Drugs” (Human Rights Watch) <<http://www.hrw.org/news/2011/11/09/mexico-widespread-rights-abuses-war-drugs>> accessed 05 February 2014

<sup>241</sup> Human Rights Watch (n 85) 53

which in the Mexican Code of Military Justice is conceived as committed by “the military that treats an inferior in way that is contradictory with the legal prescriptions” (Article 293)<sup>242</sup>. According to the military frameworks, such misconduct only applies between military personnel; nothing is established in the case of abusing a civilian. As there is no domestic mechanism left due to the inactivity of local prosecutors, there is enough evidence to suggest the intervention of International Criminal Law in the Mexican scene. The last important element to establish is the nexus between the attack and the crimes. In the Mexican case, documents show that military personnel have committed human rights abuses while performing security tasks, uniformed and in official vehicles. This would suggest that, even if the victims were not the ultimate target, they were around the core of the attack.

In spite of the continuous murders of innocent civilians, we can conclude there are not enough elements in order to suggest that the Mexican State has been targeting them as part of their strategy. It can be stated that the policy has been inadequate and has failed to prevent the unwanted side-effects, but it cannot be established that civilians are actively targeted by the armed forces.

#### **2.1.13 Enforced disappearance**

One of the most delicate accusations against the security forces in Mexico is their alleged implication in enforced disappearances. Human Rights Watch issued a report on this topic in 2013, in which they documented more than 140 events in which the State forces participated or were the sole responsible of the disappearance of civilians.<sup>243</sup> The report establishes that the authorities do not investigate in time the complaints and reports of the witnesses and relatives. Plus, they state that the investigators and prosecutors take an unprofessional attitude and imply that the victims were probably related in some way with illicit activities.<sup>244</sup> The severity of this crime from an international legal perspective, relies in the fact that, as HRW points out, “enforced disappearances constitute violations of the right to life, freedom from torture, and freedom from arbitrary arrest and detention”.<sup>245</sup> Such is the severity of this concept, that the UN General Assembly saw the need to create an international treaty (the International Convention for the Protection of All

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<sup>242</sup> Military Justice Code 2012 (MEX) art 193

<sup>243</sup> Human Rights Watch (n 4) [1]

<sup>244</sup> *ibid* 5

<sup>245</sup> *ibid* 123



Persons from Enforced Disappearance), and a special protocol focused on this crime (The Declaration on the Protection of All Persons from Enforced Disappearance). Article 1(2) of the convention establishes that a state of war or any other public emergency is not a justification for allowing enforced disappearance.

HRW made an incisive point on the current Mexican legislation, as they stated that the Criminal Federal Code only included public servants as the subjects liable for the commission of Enforced Disappearance, but they did not include any other person who might be operating under the orders, commission or knowledge of a public servant.<sup>246</sup> As of 2016, the Federal Code has not been reformed to include the recommendation done. In the military legal frameworks, HRW also established that the Mexican Military Justice Code does not include Enforced Disappearance as penalised conduct.<sup>247</sup> At the moment of this writing, the Mexican legislators are elaborating a project for a framework with enforced disappearance as its main focus, but it is currently stagnant in the federal congress. The proposal has four basic points: the establishment of new forms of coordination and jurisdiction in order to prevent and sanction enforced disappearance; establishing new criminal definitions on the subject; creating a national system of data in order to find missing persons; and to guarantee the protection of rights and establishing measures of attention, aid and State reparation to the victims.<sup>248</sup> It is uncertain at the moment when the final version will be approved.

As it has been addressed, the Military Justice Code was reformed in 2014, in order to prosecute all the military personnel who are involved in the human rights abuses of a civilian, in the civil courts. This was one of the main observations that HRW had made in the same report,<sup>249</sup> as they established all the enforced disappearances in which the military were involved, were left in a state of impunity because the soldiers were being investigated under the Military Justice Code.

On August 18 2015, a civilian federal judge sentenced a soldier to 31 years in prison for *enforced disappearance*. The sentenced military personnel (it should be noted that his name is kept confidential), had been proven responsible for the

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<sup>246</sup> Ibid 129

<sup>247</sup> Ibid 131

<sup>248</sup> Senate of the Republic, "Gazette of the Senate : First Year of Exercise – First Ordinary Period" (2015) 72, <<http://www.senado.gob.mx/sgsp/gaceta/63/1/2015-12-14-1/assets/documentos/gaceta1.pdf>> accessed 20 December 2015 43-44

<sup>249</sup> Ibid 132

disappearance of a civilian the 20<sup>th</sup> of May of 2012. The judge also sentenced the soldier to be separated from his position in the army, and restricted him from working in public service for 15 years and three months.<sup>250</sup> The sentence established that the rights and juridical goods that were violated were the psychical integrity, personal freedom and life of the victim, as well as the protection of his family, and their right to know the truth.<sup>251</sup> The judge also established that the armed forces' reputation was also damaged; and he pointed that even though the military's actions were opposed to the spirit of the army, this case was an isolated behaviour,<sup>252</sup> a statement that implies that the authorities have not considered this crime as part of a policy or pattern. On the other hand, this sentence has set a precedent that will undoubtedly constitute a turning point regarding the limits of the armed forces' liability upon the civilian courts, based on the last reform to article 57 of the Military Justice Code.

## **2.2 Military Justice Code reform: ensuring effectiveness?**

On the 24<sup>th</sup> of April of 2014, the United Commissions of Justice, National Defence, first and second Legislative Studies that comment on the Navy and on Military Justice Subject (these are groups of Mexican senators that gathered to debate the reform), issued the document that contains the new legal reforms for the Military Justice Code. The reforms contained in article 57 are of essential importance to this research, as the monopoly that military courts had –even when civilians were the passive subjects of a crime–, has been reformed. It is important to make an analysis of the legal foundations for such changes, and interpret the transition articles which might create a whole for impunity of past and future human rights violations.

One of the main goals that this reform had –certainly the one that is relevant to the subject of accountability–, was to narrow military immunity, establishing that crimes against military discipline which are committed by their personnel, and in which civilians were involved, would be under the jurisdiction of civilian

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<sup>250</sup> "Informative note" (*Judicial Power of the Federation*)

<<http://www.cjf.gob.mx/documentos/notasInformativas/docsNotasInformativas/2015/notaInformativa88.pdf>> accessed 1 January 2016

<sup>251</sup> *ibid*

<sup>252</sup> *ibid*

authorities.<sup>253</sup> This reform started to be developed in 2009, by members of the Democratic Revolution Party (PRD).

The senators were influenced primarily by the judgement that the Inter-American Court of Human Rights in the *Radilla-Pacheco v. Mexico* case (Judgement of November 23, 2009). The Court established that the Mexican State was responsible for violation of the rights to humane treatment, juridical personality, personal liberty, and life; all covered by the American Convention of Human Rights (articles 5(1), 3, 7(1), and 4(1)), plus articles I and XI of the Inter-American Convention on Forced Disappearance of Persons, in detriment of Rosendo Radilla-Pacheco. In its Operative Paragraph no. 10, the Court established that Mexico should adopt appropriate reforms to article 57 of the Code of Military Justice, in order to be compatible with the American Convention on Human Rights, and other international standards on the subject. Plus, recommending the State to implement courses that focus on the analysis that the IACHR did on the case, in order to establish the limits of military criminal jurisdiction.<sup>254</sup> At a domestic level, the senators established that there was a direct conflict between the limits of the Military Justice Code and article 13 of the Mexican Constitution.<sup>255</sup> Strangely enough, the first one was issued in 1933, while the Constitution was established in 1917, but the Military Code, being a secondary law, took a character or legal preponderance in the subject of immunity.<sup>256</sup> The next criteria that the legislators took as a foundation for the reform was a domestic set of criteria that the Supreme Court of Justice had stated concerning the situation of military jurisdiction.<sup>257</sup> The referred set contains six separate criteria -which are called “isolated thesis” in the Mexican legal system-, and in which the ministers of the Supreme Court state that military jurisdiction should not monopolize the judicial situation of a crime in which a civilian is involved, as the file should be investigated and tried in civilian courts. The isolated thesis also

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<sup>253</sup> “Military Justice Code 23rd April 2014” Senate of the Republic – LXII Legislature, 5

<sup>254</sup> *Rosendo Radilla v Mexico* (n 229) [10] [12]

<sup>255</sup> Article 13 – “No one can be judged by private laws or by special tribunals.....there is war immunity for the crimes and misconducts against military discipline; but for no motive should the military tribunals extend its jurisdiction over persons that do not belong to the Army. When there is a civilian involved in a crime or misconduct of military order, the correspondent civilian authority will take knowledge of the case”.

<sup>256</sup> Senate of the Republic (n 248)105

<sup>257</sup> Isolated thesis, 10th era, Plenary Session, Supreme Court of Justice and its Gacet, XVIII book, March 2013, volume 1, pp. 359l 360, 364, 366, 368, Isolated thesis, 10th era, Plenary Session, Supreme Court of Justice and its Gacet, I book, October 2011, volume 2, 1085

stated that the military immunity established in the military justice code contradicted the American Convention on Human Rights, which as it has been previously stated, was the sentence on the Rosendo Radilla Case. The ministers also stated the legal right that the family of a civilian victim to present an “*amparo*” (injunction) against the decision of a military judge to take jurisdiction over such cases. We can establish the vast amount of pressure that was put on the legislators in order to establish limits and organise a well-defined jurisdiction between the military and civilian courts.

The need to establish liability for military personnel under civilian jurisdiction was not exclusive to the IACHR and the Mexican Supreme Court of Justice, as one of the first recommendations that the Mexican State received in an international context, and which influenced the senators to start debating the reform<sup>258</sup>, was a report made by the Committee against Torture (CAT/C/75). This report was issued on 2003, before the current security strategy started, but when the army was already conducting certain operations related with anti-narcotics policies. On its paragraph 220(g), the committee established to restrict the application of military law to misconducts strictly related to military issues, and continued establishing that legal reforms needed to be made in order to give competence to civilian courts to conduct trials against human rights violations committed by military personnel.<sup>259</sup>

This committee continued to monitor the security strategy in Mexico, and subsequently issued a Consideration of reports submitted by States parties under article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/MEX/CO/4), which states the need to establish the crime of torture in military codes. They recommended the Mexican State to ensure that military personnel who violated human rights of civilians are tried in civil courts “even when the violations are service-related”.<sup>260</sup> This last statement was not considered appropriate for the Mexican legislators, as crimes and misconducts that are of a strictly military nature will continue to be investigated and prosecuted by military courts. As the conflict in Mexico continued, more innocents became victims of abuse, including underage citizens; in regards to this issue, the Committee on the

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<sup>258</sup> Senate of the Republic (n 248) 129

<sup>259</sup> UNCAT “Report on Mexico Produced by the Committee Under Article 20 of the Convention, and Reply from the Government of Mexico” (26 May 2003) CAT 13<sup>th</sup> session (2003) CAT/C/75 [220(g)]

<sup>260</sup> *ibid* [14]

Rights on the Child also made investigations on such abuses and issued an official report regarding the situation of children in armed conflicts in 2011 (CRC/C/OPAC/MEX/1).<sup>261</sup> It should be noted that the same committee had issued statements about the need for the civilian justice to have jurisdiction over military personnel since 1994, when it presented a report on Mexico regarding article 44 of the Convention on the Rights of the Child.<sup>262</sup> International recommendations that asked for civilian liability on military personnel continued with the concluding observations of the Human Rights Committee issued by the Centre for Civil and Political Rights (report CCPR/C/MEX/CO/5); this time, the issues which as addressed to the Mexican State had the goal of ensuring an effective remedy for the victims, as they thought that the violations got lost in the military jurisdiction.<sup>263</sup>

The Human Rights Council issued two reports which also added more pressure against military monopoly on their own personnel; these documents consisted in a Report of the Special Rapporteur on the independence of judges and lawyers (A/HRC/17/30/Add.3); they focused on several issues which also tended to point out the need to guarantee access to justice from the victims' perspective.<sup>264</sup> The second document was a Report on the Working Group on Enforced or Involuntary Disappearances (A/HRC/19/58/Add.2); on such report (para 98), the working group expressed their concerns about the enforced disappearances and other human rights violations and –again-, pressured the State to reform the aspects of military justice that granted immunity from civilian law.<sup>265</sup> It can be seen that the international pressure was essential for the Peña Nieto administration in order to gain some degree of international legitimacy, after the troubled elections (something that his predecessor, Felipe Calderón, never did, despite suffering from a similar lack of legitimacy in the eyes on an important sector of Mexican society).

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<sup>261</sup> UNCRC “Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Concluding observations: Mexico” 56<sup>th</sup> session (7 April 2011) CRC/C/OPAC/MEX/1[30(b)]

<sup>262</sup> Ibid [17]

<sup>263</sup> UNICCPR “Concluding observations of the Human Rights Committee – Consideration of reports submitted by States Parties under article 40 of the Covenant: Mexico” ( 17 May 2010) 98<sup>th</sup> session (2010) CCPR/C/MEX/CO/5 [18]

<sup>264</sup> UNGA “Report of the Special Rapporteur on the independence of judges and lawyers” (18 April 2011) HRC (2011) A/HRC/17/30/Add.3 [94(r)]

<sup>265</sup> UNGA “Report of the Working Group on Enforced or Involuntary Disappearances, Addendum – Mission to Mexico” (20 December 2011) HRC 19<sup>th</sup> session (2011) A/HRC/19/58/Add [298]

The amount of international and domestic focus on the lack of equality upon the law between civil society and the military, leads to the conclusion that since the security strategy focused on deploying the armed forces for specific operations on civilian spaces, its personnel were not trained in dealing with civilians in their confrontations with organised crime. To be more precise, the situation magnified itself after ex-president Felipe Calderón permanently deployed the army on December of 2006. This security strategy, as it has been stated previously on this research, has been continued by current president Enrique Peña Nieto.

The senators then proceeded to develop a legal analysis and juridical valuations of the initiatives made by both the federal government, and the personal initiatives sent by a couple of legislators. The first point which was analysed were the limits of military immunity: at a domestic level, article 57 fraction II of the Military Justice Code was incompatible with article 13 of the Mexican Constitution (which states that the military cannot extend its jurisdiction when civilians are involved), and in an international level the legislators concluded that the military code contradicts articles 2<sup>nd</sup> and 8.1 of the American Convention on Human Rights, and also article 14 of the International Covenant on Civil and Political Rights.<sup>266</sup> The Mexican legislators should have taken into account article 8 of the Universal Declaration of Human Rights in order to state legal priority between legal frameworks, but that is a matter of pure subjectivity.

The legislators then continued to develop their criteria: one of the main points established in the charter is the fact that when military tribunals exercised jurisdiction on their own personnel –on cases where a civilian is involved-, the courts are also taking power over the juridical situation of the last one (the victim). This created a conflict when the victim wants access not only to the compensation for the damage suffered, but also an effective access to the truth and justice (this criteria seems to be taken literally from the isolated thesis that the Supreme Court issued), which contradicted article 13<sup>th</sup> of the constitution. The criteria established that if juridical matters that do not correspond to the military sphere are violated, the jurisdiction of military courts is not enough. The legislators once again referred to the statements made by the Supreme Court, which established that military courts would be competent only when crimes of a strictly military nature are committed and

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<sup>266</sup> Senate of the Republic (n 248) 136

no civilians are involved in it.<sup>267</sup> Based on the previous considerations, the legislators centred the reform of article 57 in the following way:

*Local or federal crimes committed by militaries will also be considered crimes against military discipline, as long as the passive subject who is being affected by the criminal behaviour does not have the status of civilian or holder of the juridical good, which is put in danger by the action or omission provided in the legal framework as a crime, in the circumstances stated in points a) to e) of fraction II of the mentioned article.*<sup>268</sup>

There is another subject which is relevant that could be interpreted in a critical way; there is an addition in the same article which tries to homogenize the 13<sup>th</sup> article of the Constitution (which states that civilians cannot be judged in special courts), with the Military Justice Code. The main goal is to establish that when militaries and civilians act as active subjects, only the first ones will be judged by military justice.<sup>269</sup> This research has found no previous cases of civilians having being judged by military courts, precisely because when they have been arrested, they have either been set free, or disappeared.

According to the charter developed by the senators, the reform has established that the limits of military immunity had been drawn in a clear way under two fundamental guidelines: they have given a much more restrictive and exceptional character to military criminal jurisdiction; and the victim has been given the right to participate in the criminal process, not only for matters of compensation, but also exercising their rights to justice and truth.<sup>270</sup> At this point, another contradiction is found with another point that was approved as part of the reform: the senators approved, based in previous criteria from the Supreme Court which established that, regardless of the jurisdiction that knows of the facts in a crime, a military does not lose this quality. The commissions that reformed article 57 pronounced in favour of giving the military personnel that has been sentenced, or are in the stage of preventive prison, the option to spend their sentence in a military prison, according to the commission. The main argument behind this, is “the safety of the sentenced military”, which established that the sentenced personnel should be the one that make these requests to the judge who was in charge of the

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<sup>267</sup> Ibid 137

<sup>268</sup> Ibid 139

<sup>269</sup> Senate of the Republic (n 248) 139

<sup>270</sup> Ibid 140

process.<sup>271</sup> This creates suspicion, as one of the main problems of the current military prison system is its secrecy, which keeps most of its information away from the public, as even in cases in which the victims from human rights abuses have requested information about their case, the military prosecutors have denied it. How is it possible to guarantee true access to justice to a civilian victim if a military gets the option to spend his prison term in the secrecy of the military facilities?

#### *Judges of sentence implementations and ministerial military investigators*

The second main point which the new reform brings is the creation of judges which will be in charge of the surveillance of the implementation of sentences. The main goal in this part of the reform is to have a system of vigilance to make sure that the military penitentiary system is organised over a base of work, training, solving health issues, education, military training, and sports as ways to make sure that the sentenced personnel will be capable of reincorporating to its military activities, and to society as a whole. Once the prisoner has been sentenced, he will follow the law and be able to meet up the standards required.<sup>272</sup> This is basically a point in the reform used to meet the standards of the Criminal Code reforms of 2008, which established the figure of Judges of Sentence Implementations in order to improve the conditions of reinsertion to society from ex-convicts. Another relevant point is that once an investigating commission establishes the existence of a civilian involved in a military crime, they have the obligation to submit the file to their civilian colleagues in order to have them taking the first steps in such investigation.<sup>273</sup> This point can be considered as one of the most positive in the whole reform, as civilian investigators have shown to be (at least to a larger degree), more open to share information in a public and transparent way than their military counterparts.

There is a basic point which is necessary to address here: in the transitory articles of the charter that the Senators Chamber developed, it is stated in its third point that the investigations and criminal trials that have been initiated before the reform -and *where the crime committed violates military discipline*-, will be processed and concluded according to the legal dispositions applicable at the moment of the commission suspected crime. Besides, the implementation of the sentence will also be according to the legal dispositions available before the reform.

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<sup>271</sup> Ibid 145

<sup>272</sup> Senate of the Republic (n 248) 141

<sup>273</sup> Ibid 142



On the fourth transitory article, the senators established that the investigations and criminal trials that were initiated before the reform, and in which *the crimes committed do not violate military discipline*, will be forwarded to the according civilian authority in a term of 30 days after the reform starts its effect.<sup>274</sup> While this would be totally coherent with the standards that current international human rights frameworks contemplate, it is important to remember that there are at least seven cases in the public file of the National Defence Secretary website that involve enforced disappearance, torture, and physical assault in which civilians and military personnel are involved, in which the crime being investigated or tried is “abuse of authority”, which is classified as a strictly military discipline misconduct.

### **2.3 The use of firearms by the military**

There is an important aspect of the current security strategy in Mexico, which has not been properly addressed, not even after the Military Justice Code reform. This is the use of fire arms by the security forces, and the military in particular. The UN developed a series of guidelines (The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials), in order to regulate the use and behaviour of firearms by governments and law enforcement agencies.

These principles base their criteria on the protection of life, liberty and security located in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Code of Conduct for Law Enforcement Officials. At a domestic level, the Mexican State issued the Basic Principles for the Use of Force and Firearms by Servants in Charge of Law Enforcement 1990.

The Mexican code builds their principal guidelines on the assumption that officials will only use firearms when it is inevitable (principle 5), and that its use will be proportionate to the nature of the crime and the “legitimate goal that is pretended”.<sup>275</sup> It also establishes that the officials will notify the relatives and close friends of the affected persons.<sup>276</sup> This is clearly detached from the reality, as the relatives of various suspects have stated that the authorities not only have failed to notify them of their whereabouts, but have actually used methods of intimidation in order to discourage them from enquiring. An additional point of importance for this

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<sup>274</sup> Senate of the Republic (n 248) 253

<sup>275</sup> Basic Principles for the Use of Force and Firearms by Servants in Charge of Law Enforcement 1990 (MEX) [5a]

<sup>276</sup> Ibid [5-d]

discussion is principle 8, which establishes that “no exceptional circumstances such as internal political instability or *any other public emergency situation*, in order to justify the breaching of this basic principles”.<sup>277</sup> Under this principle, it could be established that the current security conflict would not justify the abuse of civilian’s rights, and much less extreme measures, like the permanent armed deployment at checkpoints and general patrolling.

## **2.4 Transitional justice in transitional democracies**

Most of the former communist states have been reforming their civil-military relations in order to prevent their armed forces forming a Pretorian state. Leigh provides a deep insight on some of the main reforms that mark a transition in civilian control from communism to western democracy. Article 92 of the Slovenian constitution establishes that “A state of emergency shall be declared whenever a great and general danger threatens the existence of the State. The declaration of war or state of emergency, urgent measures and their repeal shall be decided upon by the National Assembly on the proposal of the Government. The National Assembly decides on the use of the defence forces. In the event that the National Assembly is unable to convene, the President of the Republic shall decide on matters from the first and second paragraphs of this article. Such decisions must be submitted for confirmation to the National Assembly immediately upon the next convening.”<sup>278</sup> This is an example of a qualitative reform in which the Slovenian State achieved a truly democratic balance between the legislative and executive powers. It also forces both branches of the State to justify the reason for establishing such powers upon society, as not every threat would be considered dangerous enough to establish a State of emergency.

The Estonian legislation has established in its Article 65 a Commander in Chief of the Defence Forces; this commander will be appointed by the Parliament. By its part, the Romanian Constitution concedes power to the Parliament to monitor all security and defence matters. Its Article 62 mentions that the Senate and the Chamber of Deputies will meet and establish the proceedings with the majority of the voting. The situations which will be subjected to this parliamentary procedure are: declaration of state of war; suspension or ceasing of an armed conflict; the

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<sup>277</sup> Basic Principles for the Use of Force (n 275) [8]

<sup>278</sup> I Leigh, “Democratic Control of Intelligence and Security Services: A Legal Framework”, in A. Bryden, P. Fluri (eds), *Security Sector Reform: Institutions, Society and Good Governance* (Nomos Verlagsgesellschaft, Baden-Baden, Munich 2003) 117

examining of Supreme Council of National Defence reports and of the Court of Audit; the appointment on proposal of the Romanian president, the Romanian Information Service director, and to perform control over the Service's activity. Article 117 of this constitution considers the military organisation and structure as an "organic" matter, so all its legislation must be approved with the voting of a special majority; article 85 of the Bulgarian constitution establishes that political or military treaties must be approved by its Parliament.

Apart from those very concrete moments in which the State gives special power to its soldiers, most modern democracies tend to contemplate the everyday military as a citizen, the only difference is that military personnel have very defined rights and obligations provided by their legal frameworks. Legal officers in 1911 stated that a "soldier differs from the ordinary citizen in being armed and subject to discipline but his rights and duties in dealing with crime are precisely the same as those of the ordinary citizen".<sup>279</sup> It is precisely because of this modern conceptualization of the soldier that western democracies proceeded to reform their armed institutions, in order to create a well-established link between the citizens and military personnel. In contradiction to such concepts, undeveloped democracies, such as that which exists in Mexico, have isolated the soldier not only from a physical and social perspective, but also from a legal one, due to the establishment of military courts which had a complete monopoly (until recent times), of carrying out the investigation, course of the trial, penalization and social rehabilitation, apart from having their self-made legal codes. If the Mexican State wants the common citizen to view the soldier as another citizen, it must be subjected to the same obligations and process of accountability.

One of the main differences between a soldier who operates under normal warfare statutes and one that operates under emergency bodies is the kind of obligations that he as a public servant has in the light of ordinary crime. A soldier operating under normal status has the duty to take "reasonable measures", which can stretch as far as necessary, as long as he doesn't compromise his life or personal integrity, nor does he have the obligation to chase the criminals or suspects.<sup>280</sup> The presidential decree created by Calderón which gave life to the Federal Support Force Body clearly establishes emergency tasks for the military personnel, as it states that its main goal is to "have properly trained body which will

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<sup>279</sup> P. Rowe (n 161) 198

<sup>280</sup> *ibid* 199

be ascribed to the armed forces so that, in exceptional cases in which such forces will be required to support civilian authorities in public security duties, public order restoration, and even confronting organised crime, these will count with the needed training to attend different situation from those strictly belonging to warfare”.<sup>281</sup> It is necessary to mention the institutional fragility of the Mexican context: the first group of soldiers which was deployed to do civilian tasks started their operations on December of 2006, and it was not until 10 months later that the official decree which would give legality to the army’s operations was issued, along with Calderón’s declarations which stated that Mexico was in an emergency, but did not officially issued a state of emergency.

## 2.5 Conclusion

From the analysis made in this chapter, it can be addressed that international institutions have been determinant in the reforms being done to the Mexican military legal system. The political pressure applied by institutions like the Committee against Torture, and the Committee on the Rights of the Child was successful and forced the legislators to apply new mechanisms to the old Military Justice Code structure. The effects of the new legislation in terms of the victims’ access to justice is still very limited at the moment, as there is only one soldier sentenced for human rights abuses up until the moment of this writing, even though there have been more reports of military personnel involved in human rights abuses. It is clear that new structures that regulate civil-military relations are needed, but there is also an imperative duty of the military justice system to send the files of personnel being investigated for human rights abuses to the appropriate courts, these being the civilian jurisdiction, according to the reform of article 57 of the Military Justice Code.

There is a resort to armed force by the Mexican government against organised armed groups within the State; a characteristic that is essential to define if a non-international armed conflict is taking place.<sup>282</sup> The presidential decree<sup>283</sup> issued by ex-president Felipe Calderon constitutes an official act of indefinitely deploying the armed forces in order to attack organised crime inside Mexico. The

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<sup>281</sup> Decree by which the statute that creates the Army and Aerial Force Special Body denominated Federal Support Body Forces will be reformed, *Official Diary of the Federation* (Mexico City September 17 2007) 1-2

<sup>282</sup> *Prosecutor v Dusko Tadic ada “Dule”* (Judgement) ICTY-94-1 (2 October 1995) [70]

<sup>283</sup> *Official Diary of the Federation* (n 281) 1-2

current conflict in Mexico has reached most of its territory, as the drug cartels are spread through all states of the republic, and they use high-power arms to retaliate attacks from both the armed forces and federal and local police bodies. Extreme violence is not only used for self-defence against the State forces, but also to execute enemies. For this reason, it has been established that the raise of violence in Mexico is associated with the cartels.<sup>284</sup> The indefinite deployment of the army shows that the violence caused by organised crime is not sporadic, but systematic and permanent, as armed aggression is essential for the cartel's survival.

The drug cartels, as non-State actors, have also shown a well-defined level of organisation, as cartels are complex structures made of different cells and criminal networks. They produce, distribute and sell their product in the same way as an enterprise.<sup>285</sup> This is also consistent with contemporary requirements to identify domestic armed conflicts.<sup>286</sup> It can be stated that the characteristics of a non-international armed conflict are applicable to the current security context in Mexico.

Because of the high level of organisation and aggression that the organised crime groups pose to the government, the State has tacitly recognised a situation of belligerence, which the ICRC establishes, "can be deduced from government measures or attitudes towards an internal situation of conflict".<sup>287</sup> These measures are obviously the permanent deployment of the armed forces, started by a presidential decree, and continued as one of the main points of the security strategy in both ex-president Calderon's administration and the current Peña Nieto government. Independently of the fact that Mexico is not a party to Additional Protocol II, there is no doubt that various facts that are characteristics of a non-international armed conflict are currently taking place inside the country.

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<sup>284</sup> G Robles, G Calderon, B Magaloni, "The economic consequences of drug trafficking violence in Mexico" (Inter-American Development Bank IDB, November 2013), 11

<sup>285</sup> National Drug Intelligence Center 2010

<sup>286</sup> "Internal conflicts or other situation of violence – what is the difference for victims?" (ICRC Resource Centre October)  
<<http://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>> accessed 2 July 2013

<sup>287</sup> Y Sandoz, C Swinarski, B Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Geneva 1987) 1321

The Mexican State has complied with the requirements of IHL by creating the Interministerial Committee on International Humanitarian Law, and is currently elaborating the law on enforced disappearance. While the rhetoric of the authorities seems to be congruent with the recommendations of institutions like the Committee against Torture, the reality of civil-military relations in Mexico is still very far from truly engaging in the standards that a democratic society should have.

There are important points to make regarding the accusations and the petitions for IHL and the ICC to intervene in the Mexican conflict. First, the probability of any military commanders being prosecuted for crimes against humanity is very low, due to the fact that the official strategy does not contain any type of group as a specific target. While there is evidence that suggests that unlawful orders have been given, such orders have not been part of an official *modus operandi* of the National Defence Secretary. This is an essential requirement for the liability of crimes against humanity.

The possibility of members of the armed forces to be prosecuted under War Crimes will depend on the will to act on the principle of complementarity of the ICC, as until this moment the Mexican judicial system has had complete control over the investigations of the members of the armed forces which have been accused of human rights abuses. In the latest report of military personnel who is being subjected to an investigation/prosecution,<sup>288</sup> case AP/PGR/BC/ENS/962/12/I has “illegal search warrant, illegal arrest and torture”. The Human Rights National Commission issued a recommendation establishing that an investigation done by the adequate authorities should be done, but up until the 24 of February (the day of the last update), the case file only mentioned that “the recommendation had been successfully fulfilled”,<sup>289</sup> although the file states that no military personnel has been prosecuted or even investigated for it.

This example shows the lack of will of the military authorities to either investigate or to submit the file to the civilian authorities for crimes which constitute severe violations of human rights (in this case it would be Torture). As it can be seen from the most recent file, the secretary states to have complied with the

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<sup>288</sup> Military personnel that have been prosecuted and sentenced (*National Defence Secretary*)

<[http://www.gob.mx/cms/uploads/attachment/file/59115/Personal\\_Militar\\_Procesado\\_y\\_Sentenciado\\_24\\_Feb.\\_2016.pdf](http://www.gob.mx/cms/uploads/attachment/file/59115/Personal_Militar_Procesado_y_Sentenciado_24_Feb._2016.pdf)> accessed 12 May 2016

<sup>289</sup> *ibid*

recommendation, but no one was convicted or even investigated for it. Are these precedents for the ICC to intervene? It is clear that the number of sentences (one until today) is completely disproportionate to the number of complaints and case files currently open. If the victims do not have real access to justice, then the Military Justice Code or any subsequent legal reforms will not have the desired effects. If the government has presented the abuse of human rights as “collateral damage”, but as it has been seen in this chapter, certain crimes like torture have the quality of being *jus cogens*, so they would not be able to be derogated or tolerated under any circumstance, even in states of emergency. To worsen the situation, the Mexican government has never acknowledged the existence of a state of emergency, and this adds a lack of legitimacy in the security structure, as the militarization of the country has been done amid a climate of “democratic normality”.

Just as the structures of accountability and prosecution in Mexico continue to show legal holes and a lack of commitment from the authorities in charge of their application, the civil-military structures and the frameworks which would regulate the permanent deployment of the army continue to lack the necessary adaptations to the current security strategy. In the next chapters the concepts of states of emergency and the modern structures of civil-military relations will be analysed.

## **Chapter III**

### **Emergency Powers, Civil-Military relations and the Mexican case**

On March 29 2016, the Federal Congress approved one of the most important constitutional reforms in recent times: the creation of a mechanism to decree a state of emergency. Until this point, the government had taken extraordinary measures, like the indefinite deployment of the armed forces to fight internal organised crime, to confront the extreme security issues that Mexico had been facing in terms of drug trafficking and other clandestine activities. One of the critiques to the governmental strategy was the absence of an adequate legal framework that would enable the State to activate extraordinary measures, when they considered having a situation that justified them. In the first half of this chapter, the legal reform will be analysed, and its main points and mechanisms of employment will be contrasted with the international standards on states of emergency. In order to address this reform, a brief explanation of the concept of emergency powers and the current international institutions which have established legal provisions to set its standards are discussed.

The current state of civil-military relations in Mexico and its development from the creation of the modern Mexican State until the present, and the main faults that have identified in the army are also established. Finally, two cases of human rights abuses committed by members of the military are presented, as they exemplify the severe lack of a well-established mechanism of protection for society. These cases will allow the reader to see the similarities between the abuses committed in Northern Ireland during the most conflictive years of the “troubles” (which are the focus of a chapter in this thesis) and the current security issues in Mexico. The lack of accountability and professional institutions that the Mexican cases exemplify is also relevant for the later comparison with Germany, as their post-WWII institutional reforms provide a point of comparison between the two countries.

#### **3.1 Emergency powers**

It is appropriate to quote Abraham Lincoln to start this section, as he was one of the first statesmen that gave the subject of states of emergency a political view:



Every man thinks he has a right to live and every government thinks it has a right to live. Every man when riven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self-defence. So every government when driven to the wall by a rebellion will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law but it is a fact.<sup>290</sup>

Carl Schmitt's theory is essential to understanding emergency powers theory in the 20<sup>th</sup> century. He stated that there was a total contradiction between exception and liberalism; emergencies are out of reach of any institutional system, therefore, a total control of power would be needed in case of them happening.<sup>291</sup> It should be addressed that Schmitt's theories have been associated with Nazism, and therefore, has been called "the Crown Jurist of the Third Reich" in some academic circles.<sup>292</sup> One of Schmitt's main points is that he does not conceptualise the state of exception within the juridical order, but placed outside of it, even though, the referred State still has an order.<sup>293</sup> This constitutes a contradiction in itself, as he is putting juridical attributes to a situation that he also places outside of the juridical order. This critique is also Shared by Giorgio Agamben, who establishes that Schmitt's theoretical attempt to "inscribe the state of exception indirectly within a juridical context" is fallacious.<sup>294</sup>

Agamben establishes that the concept of state in Emergency is "the dominant paradigm of government in contemporary politics".<sup>295</sup> He also states that the state of exception founds itself in the concept of "necessity", which is not a legal source, but it is the concept that will define the application of the exception.<sup>296</sup> Agamben did not see the state of exception as a "legalised" dictatorship, but as the

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<sup>290</sup> C.L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press, Princeton 1948) 11

<sup>291</sup> A. Khakee, "Securing Democracy? A Comparative Analysis of Emergency Powers in Europe" (2009) no 30 (Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper) 6

<sup>292</sup> C.E. Frye, "Carl's Schmitt's Concept of the Political", (1966) 28 *The Journal of Politics* 818.

<sup>293</sup> C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab, tr, MIT Press, Cambridge 1985) 12, 13

<sup>294</sup> G. Agamben, *State of Exception* (Kevin Attell tr, The University of Chicago Press, USA 2005) 30

<sup>295</sup> *ibid* 25

<sup>296</sup> *Ibid* 2

absence of law, a legal gap.<sup>297</sup> The problem with this, in the eyes of this author, is that, since the state of exception is not located within the juridical sphere, it is highly difficult to judge the acts committed under this state. Therefore there is still a lot of theory to be developed regarding the exception.<sup>298</sup>

Even though Agamben defines the exception as the absence of law, the existence of emergency frameworks would contradict his statements. Precisely, the existence of international organisms, like the Inter-American Commission of Human Rights, that will monitor state of emergencies, constitutes proof that there is some degree of legal regulation and following to the emergency provisions established by a government. The most important thing is not to violate the democratic order, and issuing emergency measures without creating a legal framework for them.

The Calderon administration did not establish an emergency state, but justified the presidential decree which deployed the armed forces without consulting the legislative and judicial powers (which are the other two pillars of the Mexican State) by establishing that the security of the nation required what can be viewed as an authoritarian decision.

In theory, emergency powers should only be applied when there is a situation that requires it as a last measure and only for a certain period of time, until the event or threat is neutralized at least enough for the State to control it through its normal institutional measures. Khakee tells us that applying emergency powers at a field level is a much more complicated task due to two main factors: trying to keep enough balance between powers and giving protection to human rights while keeping a State of Law.<sup>299</sup> *Which types of events can be considered emergencies?* O'Boyle classifies emergencies in six categories: war, economic recession, natural disasters, secessions, insurrection, and subversion.<sup>300</sup> These categories are accurate but very general because, as we saw in the last chapter, contemporary emergency frameworks do not consider every threat as severe enough for deploying a state of emergency.

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<sup>297</sup> Ibid 51

<sup>298</sup> Ibid

<sup>299</sup> A. Khakee (n 291) 6

<sup>300</sup> M.P. O'Boyle, "Emergency Situations and the Protection of Human Rights: a Model Derogation Provision for a Northern Ireland Bill of Rights" (1977) 28 Northern Ireland Legal Quarterly 160, 161

It has been difficult to discuss emergency powers without finding encountered postures. Apart from the theories of Schmitt and Agamben, Mégret states that most of the human rights are unlimited; this means that no emergency or goal justifies its limitation (for example, the right to be free from torture).<sup>301</sup> There are other rights or guarantees<sup>302</sup> which may be limited or derogated by a State in an emergency state.<sup>303</sup> The concern for how limited the promulgation of emergency powers must be is explained by O'Boyle, as he establishes that when they are applied successfully, their administrations might use them in future situations with more ease, as they might resort to them before using other methods.<sup>304</sup> Another downside of activating emergency powers, as Lord Jellicoe established, is the fact that the measures taken might alienate society or parts of it, as in his *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976*, he established that one of the most important things in the strategy to <sup>305</sup>implement these powers is to prevent the unnecessarily alienation of society.

### 3.1.1 What can be understood as a “public emergency”?

In General Comment 29 (3) on Article 4 of the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee (HRC) defined this concept by establishing that:

Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1.... The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.<sup>306</sup>

The European Court of Human Rights has conceptualised a situation of emergency as:

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<sup>301</sup> F. Mégret “Nature of Obligations” in Moeckli, Shah, Sivakumaran, Harris (eds), *International Human rights Law* (2<sup>nd</sup> edn, Oxford University Press, UK 2014) 110

<sup>302</sup> The IACHR states that are “guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof” (Advisory Opinion OC-8/87, “Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights” (IACHR, 20 January 1987) [25]).

<sup>303</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) [4(2)]

<sup>304</sup> M.P. O'Boyle (n 300) 164

<sup>305</sup> Home Office, *Review of the operation of the Prevention of Terrorism (Temporary Provisions) Act 1976* (Cmnd. 8803, 1983) [10]

<sup>306</sup> UNCHR “General Comment 29” in “States of Emergency (article 4)” (2001) U.N. Doc. CCPR/C/21/Rev.1/Add.11 [3]

...an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.<sup>307</sup>

Roy Chowdhury follows the definition of the ECtHR, just adding that an emergency situation should affect “the whole population of the area to which the declaration applies”.<sup>308</sup> Even though one can establish that the area in which the state of emergency is applied is the most affected directly, emergency provisions tend to have political, social and economic consequences on other areas in which the provisions are not being applied. On the other hand, Bonner establishes that emergency powers have three main characteristics, which he elaborates from the international frameworks and different constitutional research: a) they have an extraordinary scope, b) they provide discretionary powers and authority on the government, c) they have a temporary nature, and they will only be renewed if the emergency keeps on existing,<sup>309</sup> The “temporariness” of a state of emergency is essential for this concept to be justified, as this provisions are to be understood as a solution to the problem that caused the emergency, and whose solution would imply that the emergency is no longer needed.<sup>310</sup>

Tushnet states that emergency powers have an “extra-constitutional” nature, but in his theory democratic institutions should not control them; the control to review these powers should be given to “mobilised citizens”.<sup>311</sup> These ideas have a much more progressive background, but a very strong pressure would have to be applied from society because there is still a lack of political will from global southern States. Tushnet’s theories can be considered as the most appropriate way of giving civil society a real control over the military, as the political class is structured in a bureaucratic system that makes their relationship with society less direct than building bridges of communication with civilian

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<sup>307</sup> *Lawless v Ireland* App no 332/57 (ECtHR 1 July 1961) [28]

<sup>308</sup> S Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (St Martin’s Press, New York 1989) 11

<sup>309</sup> D Bonner, *Emergency Powers in Peacetime* (Sweet & Maxwell, Norwich 1985) 7-8

<sup>310</sup> A Greene, “Separating normalcy from emergency: the jurisprudence of Article 15 of the European Convention on Human Rights” (2011) 12(10) *German Law Journal* 1764, 1766; O Gross, “Chaos and Rules: Should Responses to Violent Crimes Always Be Constitutional?” (2003) 112 *Yale Law Journal* 1011, 073

<sup>311</sup> MV Tushnet, “Emergencies and the Idea of Constitutionalism” in T.E. Backer, J.F. Stack (eds), *At War with Civil Rights & Civil Liberties* (Rowan & Littlefield Publishers, Inc., Oxford 2006) 184

organisations. The temporary nature addressed by Bonner is also fundamental for the survival of the democratic order and the state of law. Therefore, Tushnet's and Bonner's definitions of the concept of emergency powers seem to be the most appropriate for the development of contemporary mechanisms. A combination of these authors' theories seems appropriate when comparing emergency legislations.

Contemporary legislation in Germany states that parliaments need to be part of the decision that will impose an emergency rule; this action would be a response to an official statement or proposal from the executive power.<sup>312</sup> A parliamentary decision of such importance requires more conditions than the everyday legislative acts though; most parliaments ask for a larger majority of MPs to be present and vote in favour, in order to establish emergency powers. We can see a direct contrast with the Mexican case, in which neither the parliaments nor the judicial authorities were consulted before issuing the presidential decree which deployed military personnel.

European States, such as the case of the United Kingdom and specifically the region of Northern Ireland –which will be analysed in depth in this research-, have developed emergency frameworks where the decision to issue and cease emergency powers belongs to the parliament.<sup>313</sup> Here Westminster's government lost exclusive control, and the reason behind this measure is to restrict such an important decision to a single power. As Gross and Ní Aoláin state, in modern constitutions the authority to declare states of emergencies resides in the legislative power, although in some cases, the executive is invested of more powers, the decision cannot be unilateral (without the approval of the legislative).<sup>314</sup>

There is a dichotomy in the application of emergency powers, as Bonner has addressed; on one hand, the promulgation of a state of emergency will always carry inherent dangers, but at the same time, it is the duty of the government to protect its citizens and the whole State from any threat, like terrorism.<sup>315</sup> This should not mean that any kind of terrorism would have the magnitude to justify a state of emergency,

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<sup>312</sup> Basic Law for the Federal Republic of Germany 2012 (GER) (Basic Law) art. 115a

<sup>313</sup> A Khakee (n 291) 13

<sup>314</sup> O. Gross, F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, New York 2006) 56

<sup>315</sup> D. Bonner (n 309) 19

but it is an example of a crime would be severe enough to affect the democratic order of a State.

Is there any consensus on which factors should be analysed in order to classify a state of emergency? The Council of Europe have established that the following questions should be asked:<sup>316</sup>

- 1) Is the state of emergency justified?
- 2) Is the resulting response necessary and proportional to the threat?
- 3) Do the actions taken conflict with any of the State's other international obligations?

These questions help setting the scope of the emergency, and therefore, establishing its severity and the limits on the measures taken. The Inter-American Commission on Human Rights established on the "Honduras: Human Rights and the *Coup d'État*" report that: "Even in a legitimate state of emergency, each measure taken must be reasonable; in other words, it must be strictly appropriate to the cause and to the scope of the state of emergency."<sup>317</sup>

### **3.1.2 The modern concept of states of emergency in the Latin American context**

#### *The Organization of American States*

Alongside the Inter-American Court of Human Rights, the Organization of American States (OAS) is the main mechanism of diplomacy and conflict solving that the American countries have to face international and domestic challenges. This figure includes a chapter dedicated to collective security, which is a consequence of the Rio Treaty celebrated in 1947.<sup>318</sup> The States have specific obligations between them that are established by Article 1 of the Additional Protocol in Economic, Social, and Cultural Rights (Protocol of San Salvador), establishing the need for cooperation depending on the available resources of each one.<sup>319</sup> The

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<sup>316</sup> Recommendation 11859, The protection of human rights in emergency situations (9 April 2009), 2.2 [10]

<sup>317</sup> IACHR, Honduras: Human Rights and the Coup D'Etat, (30 December 2009) OEA/Ser.L/V/II. Doc. 55 [ 222]

<sup>318</sup> S. Davidson, *The Inter-American Human Rights System* (Dartmouth Publishing Company, Hants 1997) 4

<sup>319</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining

organism has also worked on issuing political statements about current issues in Latin America; this is understandable, as the continent has split in very different ideological positions, making cooperation between countries –and especially between hemispheres-, a complicated matter. The OAS has been trying to fulfil the role that an “American Union” (thinking in the European Union model) would have done.

The OAS is organised as most State assemblies, with the General Assembly on top, seconded by the Councils; The Inter-American Juridical Committee; the Inter-American Commission on Human Rights; the General Secretary; the Specialized Conferences; and the Specialized Organs.<sup>320</sup> In the subject of international law, the Charter establishes that the Inter-American Judicial Committee will work as an advisor in legal matters, developing international law frameworks, and attempting uniformity in the legislation of the OAS members.<sup>321</sup>

One of the essential autonomous organs of the OAS is the Inter-American Commission on Human Rights (IACHR). Its main functions are the observance and the defence of human rights, and their work as an advisor of the OAS.<sup>322</sup> The Commission presents an annual report to the General Assembly of the OAS,<sup>323</sup> which, among other contents, includes special reports on the situation of human rights in member States that are subjected to different criteria. Among them, the report will include any situation in which the exercise of rights has been unlawfully suspended by promulgation of exceptional measures, like a state of emergency.<sup>324</sup> This phrasing implies that any state of emergency would be unlawful by nature, but the rest of the Rules of Procedure does not address the validity of such measure again. A rephrasing would be beneficial as the current provision is vague.

#### *The American Convention on Human Rights*

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to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992) art 1

<sup>320</sup> S. Davidson (n 318) 5

<sup>321</sup> Charter of the Organization of American States (adopted on 30 April 1948, entered in force 13 December 1951) 119 UNTS 3, art 99

<sup>322</sup> Rules of Procedure of the Inter-American Commission on Human rights (2009) (as amended), art 1

<sup>323</sup> Ibid [ 58]

<sup>324</sup> Ibid [59-6b]

## Article 27

This article is essential for the domestic development of emergency powers in Latin American countries. The first paragraph of such article states that:

*In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion, or social origin.*<sup>325</sup>

In order to perform a correct interpretation of article 27 of the American Convention on Human Rights, the concept of “suspension of guarantees” will be explained. The Manual on Human Rights for Judges, Prosecutors and Lawyers also points out that the term “suspension” is also mentioned in article 27(2) and (3), at the same time that the phrase “measures derogating from” is expressed in article 27(1). The Inter-American Court has explained the former concepts stating that certain rights are inherent to men and cannot be suspended, and that only certain limitations can be applied to them.<sup>326</sup>

### *The Covenant on Civil and Political Rights*

The foundation for the faculty of States to derogate from their obligations in situations which can be justified is article 4. This article (among secondary sources such as paragraph 21 of the Manual on Human Rights for Judges, Prosecutors and Lawyers) establishes on its paragraph 2 that some rights may never be suspended,<sup>327</sup> and the Court has established that the States will do their best effort to guarantee as many as possible. Here the Court expresses that unless there is a situation so severe that truly requires the restrictions of certain rights, these shall always be at the forefront of any social context. The ideology when applying emergency powers must not seek to undermine human rights, but to preserve them unless there is absolutely no other choice. The Court continues to establish the

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<sup>325</sup> American Convention on Human Rights 1969, art 27 [1]

<sup>326</sup> Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), OC-8/87, Inter-American Court of Human Rights (IACtHR), 30 January 1987, 37 [8]

<sup>327</sup> Art 4 para 2 - “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”



importance that the State shall not break this principle, which is the foundation of every democratic State.<sup>328</sup>

### *The Inter-American Court of Human Rights*

The Inter-American Court of Human Rights (IACHR) also establishes the duty of the State to provide security.<sup>329</sup> However, the Court establishes that: “regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited nor may the State resort to any means to attain its ends. The State is subjected to law and morality, so disrespect for human dignity cannot be part of any State action.”<sup>330</sup> Related to the limits on the suspension of rights that States have to meet a certain goal, the IACHR has established concrete jurisprudence regarding emergency powers before. In 1987, the IACHR issued an advisory opinion on the *habeas corpus* (the legality of a person’s detention by the State forces) in emergency situations, where they established that even in severe situations of emergency, some rights, like the essential judicial guarantees, cannot be suspended (expressly the ones established in article 27(2)).<sup>331</sup> These judicial guarantees will be analysed in scope of each individual context, depending on the rights that are in danger, but to measure which ones will be considered essential, the analysis must be towards which rights would deny or restrict the full enjoyment of the referred judicial guarantees, if they were suspended.<sup>332</sup> The Court concluded that “the suspension of the legal remedies of *habeas corpus* or of *amparo* (injunction) in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention.”<sup>333</sup>

In 1987 the government of Uruguay had an advisory opinion from the Inter-American Court on the matters of suspension of the judicial guarantees in states of emergency, asking exactly which guarantees are “essential” (as established in art.

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<sup>328</sup> Advisory Opinion OC-8/87 [20]-[21]

<sup>329</sup> *Velásquez Rodríguez v Honduras* (Judgement) Inter-American Court of Human Rights, Series C No 4 (29 July 1988) 146 [154]

<sup>330</sup> *ibid* 147 [154]

<sup>331</sup> Advisory Opinion OC-8/87 [18].

<sup>332</sup> *ibid* [29]

<sup>333</sup> *ibid* [43]

27(1)), and the relation between article 27(2),<sup>334</sup> concerning such essentialness, with articles 25<sup>335</sup> and 8<sup>336</sup> of the American Convention on Human Rights. The Court referred again to the *Habeas Corpus* in Emergency Situations Advisory Opinion, in order to define the guarantees, and to point out the recourse of the injunction. In this advisory opinion, the Court established that "...the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking."<sup>337</sup> The Court empathised the rationale of effectiveness, as they established that the mere existence of a right in the law is not enough to guarantee its application, without being effective in practice because of different circumstances, like the lack of independence from the judicial authorities.<sup>338</sup> This is how the Court ties the essential guarantees with the right to judicial protection and a fair trial, which must prevail even in states of emergency. The Court infers that the overall status of an emergency means that the certain rights (life, humane treatment, freedom from slavery, freedom of conscience, rights of the family, right to a name, political association, nationality, rights of the child) must never be suspended. In case they were unlawfully suppressed, the right to judicial protection and fair trial must be completely available in order to restore the other rights lost.

### **3.1.3 The Rosendo Radilla case**

One of the most important crimes that have been attributed to the Mexican armed forces in recent years is enforced disappearance. For this reason it is important to refer the Rosendo Radilla case, for which the Inter-American court has published its judgment. In order to see how what is the Court's understanding of human rights abuses committed by the armed forces in Mexico about enforced disappearance, it is relevant to point out some of the facts.

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<sup>334</sup> "The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights."

<sup>335</sup> Right to Judicial Protection

<sup>336</sup> Right to a Fair Trial

<sup>337</sup> Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-American Court of Human Rights (IACtHR ) October 6, 1987 [24]

<sup>338</sup> *ibid* [24]

Rosendo Radilla Pacheco was a political and social activist in the very poor region of Atoyac de Álvarez, in the state of Guerrero, Mexico. He was arrested for composing *corridos* (a style of folk music with lyrics based on stories about drug-smuggling), even though this was not considered a crime, at the time of his arrest;<sup>339</sup> his family never saw him again. After decades of justice obstruction and delays, Rosendo's family submitted a complaint to the Inter-American Court of Human Rights.

The Court decided that the Mexican State was responsible for the violation of personal liberty, human treatment, juridical personality, and life as established in the American Convention on Human Rights.<sup>340</sup> Even though the disappearance of Radilla was not done in a context of a declared state of emergency, the Court referenced article 1a of the Inter-American Convention on Forced Disappearance of Persons,<sup>341</sup> in order to establish the responsibility of the Mexican State upon this treaty, as the accused had established that "military jurisdiction is competent to hear a case of forced disappearance if a member of the armed forces commits the crime while on duty".<sup>342</sup> The Court's reasoning did also establish that Radilla's disappearance had not been an isolated event, but had been taken part in a context of "...massive arrests and forced disappearances, which leads to the conclusion that it put him in a grave situation of risk of suffering irreparable damages to his personal integrity and his life." <sup>343</sup> The Court also established that the military had been in charge of his safety from the moment of his detention, and his disappearance also constituted cruel and in humane treatment because it was established that he had been isolated in solitary confinement.<sup>344</sup>

Radilla's case was also essential in the future shaping of the 2014 Military Justice Code reform, as the Court concluded that the State violated the right for a competent tribunal, as the military courts were not competent to resolve a case of forced disappearance.<sup>345</sup> This rationale influenced the competence of civilian courts

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<sup>339</sup> *Rosendo Radilla v Mexico* (n 229) 124-125

<sup>340</sup> *Ibid* op [3]

<sup>341</sup> "Article 1 a) Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees"

<sup>342</sup> *Rosendo Radilla v Mexico* (n 229) [307]-[308]

<sup>343</sup> *ibid* [152]

<sup>344</sup> *Ibid* [152]-[153]

<sup>345</sup> *ibid* [282]

for military who were being accused of violating the human rights of a citizen. This also influenced the subsequent reform of constitutional article 29, which established the attribution of the State to issue emergency provisions, as the document of the legislative organs states that forced disappearance will not allowed or tolerated during the restriction or suspension of certain rights.<sup>346</sup>

### **3.1.4 Mexico's reform of Constitutional article 29: the creation of a state of emergency**

The constitutional reform addressed at the beginning of this chapter is essential, as it is probably the most important legal reform in emergency powers carried on since the so-called war against drugs became the centre of the governmental strategy.

As the official Bill from the Federal Congress states, the reform regulates the process of restriction or suspension of rights and guarantees that constitutional article establishes, as well as stating that such measures will only proceed in cases of "invasion, severe perturbation of public peace or other that puts society in severe danger or conflict."<sup>347</sup> The goal of this reform is re-establishing normality and guaranteeing the "enjoyment of human rights".<sup>348</sup> This entails the concept of *exceptional threat* that General Comment 29 explains, as even during an armed conflict, the promulgation of a state of emergency cannot be justified if the life of a nation is not endangered.<sup>349</sup> The phrase "or other that puts society in severe danger or conflict" has been criticised by the National Association of Democratic Lawyers (ANAD), as they have stated that such sentence is not defined in the international standards of emergency powers, and as such, it could be interpreted for personal or political interests.<sup>350</sup>

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<sup>346</sup> Governance and Human Rights United Commissions, *Of the Governance and Human Rights United Commissions, referent to the decree project bill which issues that regulatory law of article 29 of the Political Constitution of the United Mexican States* (Chamber of Deputies LXIII Legislature March 2016) 29

<sup>347</sup> Human Rights and Governmental United Commissions, *Dictate in a positive sense to the Bill which has a project the decree that issues Reglamentary Law of Article 29 of the Political Constitution of the United Mexican States* (Chamber of Deputies LXIII Legislature 1 March 2016) 3

<sup>348</sup> *ibid*

<sup>349</sup> General Comment No 29 (n 306)[3]

<sup>350</sup> R. Jimenez Vazquez, K. Micheel Salas, "Reform to article 29 denies the state of right" *La Jornada* (Mexico City 5 April 2016) <<http://www.jornada.unam.mx/2016/04/05/opinion/024a1pol>> accessed 2 May 2016

Regarding the use of the sentence “other that puts society in severe danger or conflict”, it should be pointed that article 15 of the European Convention on Human Rights, which uses the phrase “in time of war or *other* public emergency threatening the life of the nation”.<sup>351</sup> In this case though, the use of the “public emergency” concept would limit the scope of state of emergency’s application, whereas in the Mexican legislation, it is left widely open. In *Lawless v Ireland*, the ECHR established that article 15 of the Convention was “sufficiently clear; whereas they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.<sup>352</sup> The phrase used in the Mexican Constitutional article 29 is more ambiguous, and as the ANAD has pointed out, it leaves a gap for vast interpretations.

Among the essential parts of the reform, are the statements that such restriction or suspension can only be decreed when the suspended rights were “an obstacle to facing the exceptional situation, always taking the minimum possible time”;<sup>353</sup> the Bill also states that certain rights cannot be suspended in a state of emergency.<sup>354</sup> The rights listed are a direct adaptation of the rights mentioned in article 4 paragraphs 2 of the ICCPR; they are also harmonised with the Paris Minimum Standards (section C). In terms of the procedure to activate these measures, the Bill states that the executive must request it to the legislators, who will discuss it in the next 24 hours and decide in the next 48. After the approval, the state of emergency will be published domestically and internationally, and the Supreme Court of Justice of the Nation will issue a statement concerning the legality of the decree issued by the executive.<sup>355</sup> Another fundamental point about the Bill is

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<sup>351</sup> European Convention on Human Rights (2010), art. 15 - Derogation in time of emergency (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

<sup>352</sup> *Lawless v Ireland* (No. 3) App no 332/57 (ECtHR 1 July 1961) [28]

<sup>353</sup> Human Rights and Governmental United Commissions (n 347) 3

<sup>354</sup> The rights of protection from any form of discrimination; the recognition of juridical personality; life; personal integrity; family protection; the right to have a name and nationality; the rights of the youth; political rights; freedom of thought, conscience and religion; the principles of legality and retroactivity; the prohibition of death penalty, slavery and servitude, enforced disappearance, torture and cruel and degrading treatment; among others.

<sup>355</sup> Human Rights and Governmental United Commissions (n 347) 4

the emphasis made on the principle of proportionality that should be observed on the authorities' behaviour, and the legislative power has the possibility of modifying or finishing with the emergency at any point, whereas the Supreme Court is in charge of monitoring the legality of the adopted measures.<sup>356</sup> This is congruent with the principle established on the Paris Minimum Standards of Human Rights Norms in a State of Emergency, which address that "every extension of the period of emergency shall be subject to the prior approval of the legislature."<sup>357</sup>

The term "obstacle" has also been challenged by the ANAD, as they have stated that such word implies that the referred human rights would be an obstacle to face the emergency, not the situation in itself.<sup>358</sup> It is an ambiguous term, and it is not found neither on the ICCPR, The Paris Minimum Standards, or the American Convention on Human Rights. The importance of defining each term as meticulously as possible is essential in a reform of such importance.

The bill mentions the concepts of non-derogable rights at various points in its content. International law is referred as the source of such rights and in concrete, the American Convention on Human Rights (article 27), and the ICCPR (article 4) are mentioned as primary sources.<sup>359</sup> Regarding the requirements in order to suspend certain rights, the bill mentions as minimum standards the proportionality, temporality, territorial reach, and the "subjection of the taken measures to the principles of legality, publicity, proclamation and non-discrimination, among others".<sup>360</sup> These are the definitions which are given in the bill to these principles:

- a) Legality: "...pre-existence of norms that regulate the state of exception, established in the constitution and ordinary legislation, as well as the existence of mechanisms of control"<sup>361</sup>
- b) Proclamation: "refers to the State's obligation to warn the population about the state of emergency before any measures are taken".<sup>362</sup> This is

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<sup>356</sup> *ibid*

<sup>357</sup> Paris Minimum Standards (n 358) section (A)1(d)

<sup>358</sup> R. Jimenez Vazquez, K. Micheel Salas, "Reform to article 29 denies the state of right" (*La Jornada* 5 April 2016), <http://www.jornada.unam.mx/2016/04/05/opinion/024a1pol>, accessed 2 May 2016

<sup>359</sup> Human Rights and Governmental United Commissions (n 347) 7

<sup>360</sup> *ibid* 8

<sup>361</sup> *Ibid* 29-30

congruent with the criteria mentioned in General Comment 29, as the Human Rights Committee has established that before a State invokes article 4 of the ICCPR, a state of emergency must have been official proclaimed, as this is essential for congruence with the principles of legality and rule of law.<sup>363</sup>

- c) Publicity: “the obligation of the State to immediately inform the General Secretaries of the international organisations about the cases that generated the restriction or suspension of rights and guarantees, as well as the rights which will be subjected to this emergency regime, the time that the emergency will be applied and the legal provisions that will be suspended”.<sup>364</sup> This principle also harmonises with what the HRC has established in General Comment 29, as this document states that the States members of the Covenant must submit reports under article 40, where information about the law and practice regarding emergency powers.<sup>365</sup>
- d) Non-discrimination: “obliges the State not to engage in discriminatory practices”<sup>366</sup> This principle harmonises with article 4 paragraph 1 of the ICCPR, as it establishes that the measures should not be taken solely on the ground of colour, sex, race, religion, social origin or language.
- e) Proportionality: “implies that the measures applied in states of emergency should be adopted in proportion with the needs of the situation”.<sup>367</sup> This principle harmonises with the statements of the HRC, where they establish that even in both non-armed and armed conflicts should the State justify the measures taken and make sure these are legitimate and necessary for the circumstances presented.<sup>368</sup> Proportionality, as the Mexican legislators have addressed, is related to the duration, geographical scope and material reach of the state of

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<sup>362</sup> *ibid* 30

<sup>363</sup> General Comment No 29 (n 306) [2]

<sup>364</sup> Human Rights and Governmental United Commissions (n 347) 30

<sup>365</sup> General Comment No 29 (n 306) [2]

<sup>366</sup> Human Rights and Governmental United Commissions (n 347) 30

<sup>367</sup> *ibid*

<sup>368</sup> General Comment No 29 (n 306) [3]

exception.<sup>369</sup> This also replicates the arguments established in General Comment 29, as the HRC stated that the fact that article 1 paragraph 1 establish that these measures “are limited to the extent strictly required by the exigencies of the situation”, relates to the “duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency”.<sup>370</sup> As the HRC states, the extent of when can certain rights be derogated is established on the sentence that states: “to the extent strictly required by the exigencies of the situation”.<sup>371</sup>

- f) Rationality: “implies that every measure is subjected to a previous control of rationality, this means that the decision being taken should be properly justified in objective elements of appreciation, founded in the rational nature of human beings”<sup>372</sup>

There are also two distinctions which the legislative has established between the concepts of suspension and restriction. This last one is referred as a “minor measure that implies reducing or constricting the exercise of rights and guarantees”, whereas suspension “corresponds to a more severe measure, as instead of limiting or reducing, it implies to deprive of the exercise of certain rights and guarantees”.<sup>373</sup> In both circumstances, the authorities are obliged to justify why they are choosing to suspend or restrict such right and guarantees.

It should be noted that the Mexican bill does not defined the concept of public emergency, which according to the Paris Minimum Standards is defined as “an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the state is composed.”<sup>374</sup>

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<sup>369</sup> Human Rights and Governmental United Commissions (n 347) 30

<sup>370</sup> General Comment No 29 (n 306) [4]

<sup>371</sup> *ibid* [5]

<sup>372</sup> Human Rights and Governmental United Commissions (n 347) 31

<sup>373</sup> *Ibid* 28-29

<sup>374</sup> Committee on Enforcement of Human Rights, “The Paris Minimum Standards of Human Rights Norms in a State of Emergency” in International Law Association Report of the sixty-one Conference (Paris 1984) (International Law Association, London 1984) (Paris Minimum Standards) section (A) 1(b)



The reform also adds that violent conflicts are not the only situations that can be classified as “severe danger or conflict”, as the reform also establishes that: “...circumstances that generate affectations to the population for sanitary, ambient, climatic, chemical or physical reasons, as well as actions that would expose (the population) to disasters or emergencies, these being of natural or anthropogenic origin”.<sup>375</sup>

Here, the phrase *generating affectations to the population* does not follow the spirit of what the HRC has expressed, as they have clearly stated that these natural disasters *must* constitute “a threat to the life of the nation”.<sup>376</sup> Clearly the term *affectation* is not severe enough to implement suspensions on certain rights, according to the spirit of General Comment 29. It would be appropriate for the Committee to establish a similar recommendation to the one issued for Uruguay regarding their state of emergency framework, in which it is recommended that “the State party restrict its provisions relating to the possibilities of declaring a state of emergency, and constitutionally specify those Covenant rights which are non-derogable”.<sup>377</sup> This recommendation has issued as the Committee established that “the grounds for declaring an emergency are too broad and that the range of rights which may be derogated from does not conform to article 4 of the Covenant”.<sup>378</sup> In the case of the Mexican reform, the non-derogable rights are indeed harmonised with article 4 of the ICCPR, but the legislators should have been more specific in order to establish the terms on such a delicate subject.

This reform has just been approved at the moment of this writing, so its outcome and the consequences of its potential use are still unknown. The question here relies on the political will of the Mexican State to submit the requested reports to the international organisations in case that a state of emergency is declared.<sup>379</sup> The fact that complaints against the army have been at the centre of the spotlight in

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<sup>375</sup> Human Rights and Governmental United Commissions (n 347) 34

<sup>376</sup> *ibid* 5

<sup>377</sup> UNGA “Report of the Human Rights Committee Vol 1” UN GAOR 53rd session (1998) UN Doc Supp No 40( A/53/40) (Report of the Human Rights Committee Vol 1), 39 [241]

<sup>378</sup> *ibid*

<sup>379</sup> It should be noted that the armed forces have been reluctant to submit requested information to the GIEI (an independent team of investigators created by the Inter American Commission of Human Rights) about the facts surrounding the activities of military personnel during the days where 43 students disappeared in the region of Ayotzinapa, in the south of Mexico. (GIEI, *Ayotzinapa Report II: Progress and new conclusions about the investigation, search and attention to the victims* (Creative Commons, Mexico 2016), p. 140.

recent years, and the fact that the authorities fail to provide essential information about disappeared persons –even where there is evidence of State officials involved<sup>380</sup>–, damages the legitimacy of the real compromise of the State, apart from fulfilling their international obligations by establishing the new legal mechanisms. Under the new reform, any accusations of torture or enforced disappearance by officials would constitute a serious breach of Mexico’s obligations upon the international institutions, no matter if the victims of these abuses were members of the most dangerous drug cartel. The Inter-American Convention on Human Rights established in the *Velasquez Rodriguez v Honduras* case that:

...regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.<sup>381</sup>

Now that the State has fully issued a proper state of emergency constitutional provision, it has an obligation to submit very detailed information, as according to the rationale used by the HRC in the *Jorge Landinelli Silva v. Uruguay* case, the mere invocation of exceptional circumstances does not give legitimacy to the State party to evade its obligations under the Covenant; the State has the duty to “give a sufficiently detailed account of the relevant facts when it invokes article 4(1) of the Covenant.”<sup>382</sup> The former phrase would mean that any actions that the Mexican State does not justify extensively would result on a lack of commitment to their international obligations.

The reform of constitutional article 29 has been a turning point in the development of the Mexican State’s security policies. This has been the consequence of years of international organisms issuing recommendations and campaigning for the updating of an important legal gap in the Mexican legislation. It seems like a positive step in the development of legal conditions which would submit the government to stronger mechanisms of accountability and would allow international bodies to have in-depth information about the details and development of a potential state of emergency. On the other hand, there are certain phrasings

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<sup>380</sup> For more information, refer to Amnesty International’s “*Mexico: Treated with indolence: the State’s response to disappearances in Mexico*” and Human Rights Watch’s “*Mexico: Damning report on disappearances*” reports.

<sup>381</sup> *Velásquez-Rodríguez v Honduras* (n 229) [154]

<sup>382</sup> UNHRC “*Jorge Landinelli v Uruguay*, Communication No R.8/34” (30 May 1981) 36<sup>th</sup> session (1981) UN Doc Supp 40 at 130 [8.3]

that are vague and could allow a state of emergency to be issued under a discretionary justification. The main point made by organisms like the ANAD is based on their lack of trust from the current administration, and their fear of the new provision to be used with political means. The reform does include all the points that the Paris Minimum Standards, the ICCPR and the American Convention on Human Rights establish, and therefore it cannot be said that the reform is unconstitutional or violates international treaties. It is a well-structured regulation, but unfortunately suffers from an incorrect phrasing that understandably creates tension among certain sectors of society, due to the number of accusations against the security forces in the past.

### **3.2 Contemporary civil-military relations**

Modern democracies have achieved positive standards of civil-military relations by establishing strong civilian controls and accountability mechanisms. As the Council of Europe has stated, the establishment of democratic controls over the armed forces has been fundamental for the shaping of “democratic peace” among States.<sup>383</sup> At a domestic level the strong civil controls are even more needed, as a democratic order always “presumes unlimited civilian supremacy over the command of the armed forces – anything short of that defines an incomplete democracy”.<sup>384</sup>

Huntington states that civil-military relations have been understood as a part of the national security policies, which combine military security with domestic and situational security policies.<sup>385</sup> Important characteristics that are essential to explain contemporary civil-military relations are those which have been defined as “a strategic interaction carried out within a hierarchical setting”.<sup>386</sup> This is why academics like Ngoma argue that an approach to civil-military relations based on the realistic paradigm will entail negative relations between the army and society, because it “is essentially modelled to protect the interests of the state and is not necessarily focused towards national interest, which in effect could mean only

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<sup>383</sup> European Commission for Democracy Through Law “Report on the Democratic Control of the Armed Forces” (23 April 2008) CDL-AD(2008)004, No 389/2006 (European Commission for Democracy Through Law) 83

<sup>384</sup> European Commission for Democracy Through Law “Preliminary Report on Civilian Command Authority over the Armed Forces in their National and International Operations” (5 October 2006) CDL-DEM(2006)003 No 389/2006, 4

<sup>385</sup> SP Huntington, *The Soldier and the state: The theory and politics of civil-military relations* (Beknap Press of Harvard University Press, Cambridge 1957) 1

<sup>386</sup> PD Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Harvard University Press, Cambridge, Massachusetts, and London 2003) 54

regime protection and regime interests.”<sup>387</sup> Apart from the hierarchical interaction, the soldier’s professionalism is another central part of civil-military relations theory. Huntington states that professionalism constitutes a fundamental part of the *objective civilian control* over the armed forces.<sup>388</sup>

A contemporary understanding of the hierarchy addressed by Huntington can be described as the feeling of power that civilians have over the army, and not vice versa. A State that can provide its society with strong mechanisms of control over the military will create a sense of real citizen empowerment. This empowerment would naturally get expanded when civilians can have control over strategic areas that do not necessarily involve decisions at a field level. This is part of what the liberal paradigm entails, as society cooperates more with the armed forces.<sup>389</sup> Creating a civilian figure that would control political decisions regarding the army would be positive, even if the people involved in it do not have any military expertise, because this figure would leave the technical areas to the commanders. P. Feaver states that this strategic force management is divided in: structure, strategy, and operations.<sup>390</sup> So, this model comes close to the theories for enterprise management, where there are specialized areas, but also political planning and general infrastructure. The sense of civilian control would undoubtedly be beneficial for society as a whole.

The European Commission for Democracy through Law has stated that at a domestic level, civilian control is exercised by the executive, legislative and judicial powers.<sup>391</sup> This consideration is the opposite of the mechanism established for the deployment of the armed forces in Mexico, as Calderon unilaterally issued a presidential decree without consulting the other powers of the State. A set of constitutional provisions for monitoring the army was also lacking, and in the eyes of the Commission for Democracy, this form of constitutional power is fundamental, as

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<sup>387</sup> N. Ngoma, “Civil-military relations: Searching for a conceptual framework with an African bias” in G. Chileshe, M. Chimanse, N. Ngoma, P. Lawndo, T. Mbewe (eds), *Civil-Military Relations in Zambia: A review of Zambia’s Contemporary CMR History and Challenges of Disarmament, Demobilisation and Reintegration* (Institute for Security Studies, South Africa 2004) 7

<sup>388</sup> S.P. Huntington (n 385) 83-85

<sup>389</sup> N Ngoma (n 387) 8

<sup>390</sup> PD Feaver (n 386) 76

<sup>391</sup> European Commission for Democracy Through Law (n 383) 33

any governmental actions that involve the military would necessarily need a quorum to be legalised.<sup>392</sup>

### 3.2.1 An appropriate civil-military theory for Mexico?

Agency theory comes to mind when analysing the possibility of creating a civilian figure in Mexico. Such a theory sees the citizen as the “ultimate political principal”<sup>393</sup>, which means that civilians must act as monitors for the army. This comes from the power that citizens in western democracies have to elect their governments through vote; the public servant must not only be accountable to their voters and non-voters, but also guarantee that the institutions which he has been elected to administrate will work under their surveillance. According to its author, the main challenge of the agency theory is to “reconcile a military strong enough to do anything the civilians ask with a military subordinate enough to do only what the civilians authorize”.<sup>394</sup> This is congruent with what Huntington and Diamond established about State control theory, as they state that the most important decisions should be controlled by elected officials, and particularly the military should be subordinated to civilian officers elected by vote,<sup>395</sup> and the civilian leaders should also give some degree of independence to the military, which in exchange would imply that politics would keep a healthy distance from militarisation.<sup>396</sup> Janowitz by its part stated that it was preferable for the soldier to be politicised, because the armies were becoming *constabulary forces* that “provide continuity with past military experiences and traditions, but it also offers a basis for the radical adaptation of the profession”.<sup>397</sup> While it is healthy for the armed forces to have representation in the government and for the soldiers to have a high understanding of the political context they are operating within, it is better to keep a strong institutional distance between military personnel and political positions. This is one of the reasons of an active member of the army should not be elected as National

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<sup>392</sup> *ibid* 34

<sup>393</sup> P.D. Feaver (n 386) 284

<sup>394</sup> *ibid* 2

<sup>395</sup> L. Diamond, *Developing Democracy Toward Consolidation* (The John Hopkins University Press, Baltimore and London 1999) 11

<sup>396</sup> S.P. Huntington, “Reforming Civil-Military Relations” (1995) 6 (4) *Journal of Democracy* 9-17, 9-10

<sup>397</sup> M. Janowitz, *The Professional Soldier: A Social and Political Portrait* (The Free Press, New York, New York 1971) 418

Defence Secretary in Mexico, as this creates a conflict of interests between the institutions.

The agency theory is directed at the relationship that the civilians and the armed forces have on a daily basis. Feaver established that the central part of this was not if the military's actions were controlled by civilian decisions; it referred to the State's decisions which affect the military, like their budget. The author established that a lack of control in these aspects might have severe consequences like unwanted wars, because the armed forces can find many ways to exercise their power, which would not always be in the best interest of civil society.<sup>398</sup> The reluctance of the Mexican armed forces to be accountable and to submit information is an example of an exercise of power that goes against the interests of the population and is a direct challenge to the State.

Another characteristic of the agency theory is the acceptance that there will always be imperfections in civilian control over the military; the most important thing is to find equilibrium between both parties' interests, whilst ensuring that the most basic elements for a civil supremacy exist.<sup>399</sup> The relation between both sides must be reformed as different situations and contexts unfold. The importance resides in establishing minimum requirements that regulate civil-military relations, especially before taking an extreme decision as a deployment, none of which existed when the armed forces were required as an aid for civilian security bodies in Mexico.

Feaver was very aware of the complications in applying the agency theory in transitioning democracies. Cases like Mexico must work on various fronts, such as their electoral system, to reform its civil-military relations, because it is more difficult for a government that takes power with a deficit of legitimacy to build strong accountability systems, when their own existence is questioned by an important part of society. This explains another of the failures in the Mexican case; Felipe Calderón took office after a highly questionable electoral process, and an important part of society always questioned the authority of his government to implement such a controversial strategy, not because of the strategy itself, but because they always suspected his commitment to democracy. This brings to memory what Sapin and Snyder stated, as they addressed that "civilian supremacy is going to depend

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<sup>398</sup> P.D. Feaver (n 386) 5

<sup>399</sup> *ibid* 286

essentially on the quality of the government's civilian leadership".<sup>400</sup> Even though Feaver established that his theory would be hard to apply in places where civilian mechanisms of control are weak and the threat of a coup is high,<sup>401</sup> Baker states that as long as there is a real government, meaning that is not just a façade of the army, the agency theory should be applicable, even though civilian monitoring might be extremely complicated.<sup>402</sup>

The agency theory has been criticised by academics like Nielsen for being negative in the sense that Feaver implies that the military will be insubordinate by nature and that the constant friction between civilians and the military is bad per se.<sup>403</sup> Avant has also established that while there are always tensions between certain civilians and members of the armed forces, there exists a great respect for the military among civil society.<sup>404</sup> The point to address here is that Avant made her critique within the US civil-military relations system, not in an authoritarian regime or developing democracy. As it has been established, Feaver was careful in order to point out that his theory would be harder, and for this reason, it can be inferred that he was correct in fact at being unoptimistic about the military's reluctance to be subordinated to the civilians, as systems like the Mexican one proves. This research will provide with an adequate comparison between different military institutions and emergency frameworks with the current Mexican policies and institutions, but the agency theory is a strong model that has a democratic spirit has the centre of it.

### 3.2.2 Militarism

Militarism is defined as the "spirit and tendencies of the professional soldier; the prevalence of a military sentiment and ideals among people; and the tendency to regard military efficiency as the paramount interest of the state".<sup>405</sup> A more

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<sup>400</sup> Sapin, Bruck, Snyder, *Decision-making as an approach to the study of international politics* (Harvard Law Review Association, Princeton 1954), p. 57, cited in P.D. Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Harvard University Press, Cambridge, Massachusetts, and London 2003) 286

<sup>401</sup> PD Feaver (n 386) 293

<sup>402</sup> D-P Baker, "Agency Theory: A New Model of Civil-Military Relations for Africa?" (2007) 7 *African Journal of Conflict Resolution* 113, 132

<sup>403</sup> SC Nielsen, "Civil-Military Relations: Theory and Effectiveness" (2005) 10 *Public Administration and Management* 61, 70

<sup>404</sup> D Avant, "Conflicting Indicators of "Crisis" in American Civil-Military Relations" (1998) *Armed Forces & Society* (24) 375, 382-383

<sup>405</sup> RL Schiff, *The Military and Domestic Politics: A Concordance theory of civil-military relations* (Routledge, New York 2009) citing the Oxford English Dictionary 1971, 27-28

simplified definition states that Militarism is “the domination of the military man over the civilian, the undue emphasis upon military demands, or any transcendence by the armed forces of true military purposes”.<sup>406</sup> As Vagts states, is it important to draw the difference between Militarism and Military Way, defining the first one as the ideology, values and ideas that shape the way that military personnel perceive of themselves; this also explains why there are regions of the world more connected with such values than others. By its part, Military Way can be defined as the practical means in order to accomplish warfare in a successful way; it has to do with the specialized fieldwork rules and tactics.<sup>407</sup>

While the military way can be shaped and used only during a specific time and context (such as war time, protection from a threat, or with the development of military schools), militarism exists as long as an army exists as an institution or as the military spirit continues to be engraved in the collective conscience of a specific society. Ideological postures in society also make an impact inside the barracks, as all members of the military were educated inside these values at a younger stage in their lives. As we have stated in the first chapter, recent surveys have established that the two most respected institutions in Mexico are the Catholic Church and the armed forces. This can give us an idea of the strong traditionalism of Mexican society. Most citizens tend to have a very limited comprehension of what academics have labelled as the military's main goals; this means serving a variety of roles over contemporary history: uniting societies sometimes by force, other times serving as heroes that led to the independence from a foreign power, and other times by creating a sense of general unity through the means of conscription.<sup>408</sup> However, no army can be left under complete freedom and detachment from a strong institutional control.

The Mexican war against drugs has been the most prominent issue which has allowed cooperation between the military and the civilian State in the last two decades. Academics as Johanna Mendelson and Louis Goodman explain the issues that the current governmental strategy represents for the development of democracy and social evolution in Mexico:

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<sup>406</sup> JJ Johnson, “The Latin-American military as a politically competing group in transitional society”, in JJ Johnson (ed), *The Role of the Military in Under-Developed Countries* (Princeton University Press, Princeton 1962) 91

<sup>407</sup> RL Schiff (n 405) citing Vagts 1959, 27-28

<sup>408</sup> A Cotter, T Edmunds, A Forster, “Civil-Military Relations in Postcommunist Europe: Reviewing the Transition” (2005) 14 *European Security* 1, 10.



It has not been easy to reconcile the measures needed to build democratic political systems and to fight drug-trafficking. Under the letterhead of military subordination to civilian authority, the dangers of the fight against drug-trafficking as an army's mission appear evident. Just as it happened in the counterinsurgency activities during the 1960s, direct participation of the Latin-American armed forces in the fight against drug-trafficking would involve the army in political duties that are found, technically, inside the civilian domain. It would also demand a mastery of a complex combination of military and political abilities that would probably necessitate the expansion of military intelligence operations. This would erase the line between what is appropriate and what is inappropriate for professional actions; it would increase the directive roles that the army performs in national politics and political decision-making.<sup>409</sup>

Wesbrook states that military culture is contradictory to current western democratic thought due to the fact that it "demands authority, honour and obedience; political ideology demands agreement, coexistence and compromise.... Besides, liberal ideology directly challenges military profession, when considering professional soldiers as a threat for liberty, democracy and economic prosperity."<sup>410</sup> If we applied the previous statement to the Mexican context, it can be established that the reason for the current conflict between the armed forces and society in Mexico is the consequence of the lack of an established democracy (at least according to global northern standards), and political citizen consciousness.

The PRD, the main left-wing party, was the first one to publically criticize the army in 1999. In their demands, the need for civilian aid to the military members of the presidential team was stated. They also made accusations of corruption and lack of accountability.<sup>411</sup> The same party has also stated that civil-military relations in Mexico have been different from the rest of most other third-world democracies due to very particular conditions, amongst them: the lack of civilian intervention in military internal issues (especially promotions), and an exaggerated emphasis on the principle of subordination during officer professionalization courses.<sup>412</sup> Left-wing politicians have also stated that the officer-politician figure allowed for the communication channels which developed such particular civil-military relations during the twentieth century. It is important to point out that neither the conservative

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<sup>409</sup> R. Ai Camp, *Mexico's Military on the Democratic Stage* (trans. Susana Guardado y del Castro, Siglo Veintiuno Editores, Estado de México 2010) 217

<sup>410</sup> *ibid* citing Wesbrook 1983, 260-261

<sup>411</sup> *Ibid* citing Diario de Michoacán 1999, 506

<sup>412</sup> *Ibid* 17

nor the socialist parties had any type of influence in State decision-making until the mid-1980s; therefore, their input on civil-military relations was very limited.

In conclusion, the concept of Militarism is useful to include in this chapter because it explains why some societies react differently to others, regarding their army. As it will be seen in the next chapter, Germany is an example of a country which completely reformed the ideology that prevailed within the army before World War II, and the modern concept which has allowed the military institutions to evolve vastly since then. Johnson's "domination of the military over the citizen" can be seen in Mexico, where the armed forces have been granted a high level of impunity and are willing to use lethal force without resorting to less violent methods, as recent statistics show that the Mexican soldiers kill eight targets for every wounded one.<sup>413</sup>

### **3.2.3 Different conceptions about military intervention at a domestic level**

There are different ways in which the military can take an active role in domestic civilian politics; these ones are: *the coup*, *praetorianism*, *displacement*. The *coup* is the most extreme of all this interventions; it is defined as "the infiltration of a small but critical segment of the State apparatus which is then used to displace the government".<sup>414</sup> At the moment of the intervention, drastic political or social changes do not occur; it is only the physical change of the group in charge of power.<sup>415</sup>

Another form of military intervention at a domestic level is *praetorianism*. Academics define this as "a politicised society where exclusive social and political groups are in collusion with the military", Huntington also establishes two types of coups, oligarchical and middle-class praetorianism<sup>416</sup>. Even though such interventions tend to transform the political path of the country, only a very small percentage of the population participates in it. This argument can be applied to any armed conflict; even in the Mexican case, which can be considered one of the most violent conflicts at a global scale, the percentage of the population who has been involved, either as criminals or victims is low compared to the total population.

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<sup>413</sup> A. Ahmed (n 19)

<sup>414</sup> RL Schiff (n 405) citing Luttwak 1979, 21

<sup>415</sup> *ibid*

<sup>416</sup> RL Schiff (n 405) citing Huntington 1968, 22

Other ways in which the military can intervene in domestic politics exist. These can consist in “displacement” or “supplancement” of a regime using various tactics.<sup>417</sup> When a State is led by a weak government which was a lot of domestic opposition, the armed forces can become a balance between both sides. This tactic can be used to put pressure to the civilian leaders in order to gain concessions. Other times they can settle indefinite support for the government, in order to act against the population.

While democratic –again, said in global northern terms- societies might have moved away from these “blackmailing” relations with its armed forces, the military can still apply pressure to the State in other forms. R. Betts explains two ways in which the military can influence it: indirect and direct.<sup>418</sup> The first one can be measured by the level of access to classified information that the military has, another way can be a specific type of leadership. As Betts explains “a few people’s action, advice, and influence are relatively unconstrained by the formal limits of their office’s purview”.<sup>419</sup>

Direct influence is easier to analyse, as it consists of institutional mechanisms of interaction between the armed forces and the civilian government.<sup>420</sup> In the case of Mexico, the group of federal deputies that form the National Defence Commission inside the Federal Congress and the Senators chamber is the most visible example of direct influence. The deputy group takes part in the analysis, opinions and legislation of everything related to the armed forces. The legal ground for their existence is stated in article 73 of the Mexican Political Constitution, which –among other attributions-, establishes that the commission must “lift and sustain the armed institutions of the Union, which are: the Army, the Navy and the National Aerial Force, and to regulate their organization and service.”<sup>421</sup> It is important to address again that the Defence National Commission was not consulted by Calderon before the deployment of the armed forces was decided, even though they

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<sup>417</sup> RL Schiff (n 405)23

<sup>418</sup> *ibid* citing Betts 1991, 23

<sup>419</sup> *ibid*

<sup>420</sup> *ibid* 23

<sup>421</sup> Political Constitution of the United Mexican States 2016 (MEX), art 73 XIV

are the maximum authority regarding military affairs in the legislative power of the civilian State.<sup>422</sup>

The level of direct military intervention in the Mexican State is difficult to measure. Active military officers have occupied positions in the federal government across the XX century (and the National Defence Secretary keeps being held by a military commander until this day), and so far the federal government has not made any comments about the accusations against the military for human rights abuses. The current reluctance of the armed forces to be subjected to stronger civilian controls of accountability creates uncertainty of the way in which they would react if the State suddenly wanted to impose stronger mechanisms of enforcement. Mexico was one of the few Latin American countries who did not have a military joint or went through a coup in the XX century, because the government's interests did not clash with the military ones.

### **3.2.4 Civil-military relations in Mexico**

Ai Camp explains that there is a lack of familiarity between Mexican society and the military, constituting an obstacle for the consolidation of a real democratic State.<sup>423</sup> Such unfamiliarity is the consequence of a cultural and physical isolation that the military went through the twentieth century; as we have stated in the first chapter, the only places in which the military performed security tasks were in the countryside and the mountains, as they seized and burned drugs, as well as repressing the guerrillas during the 70s.

The military's lack of professionalization is a recurrent topic. One of the main issues is that, according to Sarkesian, "military systems reflect society in order to keep their legitimacy; therefore, professional ethics, beliefs and attitude are developed from deep roots inside the political and social system".<sup>424</sup> If the army is isolated from the values and moral codes that civil society has built, there is a very low possibility of reforming their ethics and culture. As Ai Camp has stated, a lot of the time it is forgotten that a system of values and perspectives cannot be developed in a void.<sup>425</sup> Regarding the military personnel, F. Nunn states that most of

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<sup>422</sup> Constitutional article 76 fractions II, III y IV regulates the functions of the National Defence Commission in the Senators Chamber.

<sup>423</sup> Ai Camp (n 409) 235

<sup>424</sup> *ibid* citing Sarkesian 1981, 237

<sup>425</sup> *ibid* (n 409) 237

them have strong negative feelings towards the upper classes.<sup>426</sup> The author addresses that when the current Mexican State was in the process of early development; its forefathers had the idea that an army made of men from all social classes would be the best option to defend the country.<sup>427</sup> Contemporary politicians tend to state that the army is formed by members of the “pueblo” (a common term for the working class, which has a similar meaning as the concept of *volk*), and not from the elites.<sup>428</sup>

The lack of civilian legal control not only provides impunity for the army, but also leaves them unprotected when their own rights are violated; Ai Camp mentions the emblematic case of José Francisco Gallardo. On September of 1993, Gallardo recited a very controversial speech about the deplorable condition of human rights and the need for a military ombudsman<sup>429</sup>. Apart from asking for the development of such a figure, Gallardo’s speech asked why the inherent rights of soldiers and officers are violated, if, after all, the military institution serves as a guardian of all other guarantees, and states that military justice is selective and discriminatory, apart from stating that in order to make personnel respect internal discipline, cruel and degrading treatments are left in impunity.<sup>430</sup> After that speech, that same year, he was arrested. The Secretary of National Defence at that time, Antonio Riviello Bazán, stated that he was detained for “spreading negative ideas about the Mexican military with the goal of dishonouring, offending and discrediting the army upon the public”.<sup>431</sup> After being arrested he was prosecuted before a military court for charges related to the misuse of the military budget. The Inter-American Organization of Human Rights asked for his release various times while Ernesto Zedillo was president, without success. It wasn’t until after Vicente Fox had become president that, in 2002, he was granted his liberty, but was not granted a formal statement of

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<sup>426</sup> F.M. Nunn, “On the role of the military in twentieth-century Latin America: The Mexican case”, in D. Ronfeldt (ed), *The modern Mexican military: A reassessment* (Center for U.S.-Mexican Studies, University of California, La Jolla 1984), 42

<sup>427</sup> Refer to A. Gilly (ed), *Felipe Angeles en la Revolucion* (Ediciones Era, Mexico 2008)

<sup>428</sup> “Mexican Army celebrates 103 anniversary in the Fifth Military Zone” *El Tiempo – la noticia digital* (19 February 2016) <[http://puentelibre.mx/noticia/18292-celebra\\_103\\_aniversario\\_del\\_di/1](http://puentelibre.mx/noticia/18292-celebra_103_aniversario_del_di/1)> accessed 22 April 2016

<sup>429</sup> Ai Camp (n 409) citing Vera 2002 524

<sup>430</sup> G. Osorno, “Human Rights in the army?” *Letras Libres* (Mexico City April 1999) <<http://www.letraslibres.com/revista/convivio/derechos-humanos-en-el-ejercito>> accessed 12 July 2013

<sup>431</sup> Ai Camp (n 409) citing Anderson 1995, 524

forgiveness.<sup>432</sup> The former punishment was not only intended as revenge against Gallardo, but it seemed that its goal was to intimidate every other member of the armed forces from making public statements about their internal affairs.

The Gallardo is an example of what happens when an army has no civilian sight and control, as Mexican personnel are more likely to be subjected and punished through informal systems than to be formally prosecuted and penalized. Rowe explains that the concept of *informal disciplinary procedures* “is intended to exclude acts by soldiers’ superior in rank to the individual soldier subjected to them which are illegal, such as any use of violence in the form of bullying, initiation ceremonies or otherwise”.<sup>433</sup> The only critique that can be made to Rowe is that situations like the Gallardo case show us that, in undeveloped democracies, any member of the armed forces can be subjected to informal punishments, regardless of their position. It just depends if there is any other military on a position of higher power who can give the order to punish that certain member.

### **3.2.5 Military attitudes towards domestic political issues and its relationship with the political class in Mexico**

The Mexican military had stability in part because, as Lopez Montiel established, the hegemonic PRI party gave political positions to several members, who would always call their affair with politics a “personal” matter, and not an institutional one.<sup>434</sup> This means that the officers with powerful positions inside the army would be allowed to be a part of the political class, with all the corruption and impunity that has been part of the State included, but without having to establish upon Mexican society and the international community that the armed forces were intervening in the civil State’s decisions.

Before the current security strategy began, both Mexican and foreign academics had asked themselves if the Mexican armed forces were prepared to solve domestic conflicts. In 1984, David Ronfeldt asked if the army was prepared to “assure Mexico’s stability and security” and how their behaviour “toward a serious political or foreign policy crisis” would be.<sup>435</sup> Now the results are made visible for

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<sup>432</sup> *ibid* citing Sullivan 2002, 525

<sup>433</sup> P Rowe (n 161) 70

<sup>434</sup> AG Lopez Montiel, “The Military, Political Power, and Police Relations in Mexico City” (2000) 27(2) *Latin American Perspectives* 79, 80

<sup>435</sup> D. Ronfeldt (ed), *The modern Mexican military: A reassessment* (Center for U.S.-Mexican Studies, University of California, La Jolla 1984) 1

everyone to see: the Mexican government continued to increase its reliance on the armed forces for security measures since the 80s, but they did not develop any significant reforms to adapt them to the new contexts and conditions. Ronfeldt was right when he stated that the new world order from the late 80s would affect security conditions, as regional tensions would be more exposed to the whole world; he also stated that conflicts between the public and private sectors would arise. He also established that with private-sector elites becoming subordinated to the State, public-private tensions would arise, as long as they did not have an equal status.<sup>436</sup> What happened is that instead of achieving a status of equality, neoliberalism made the private-sector elites take over the State and subordinate politics to the economy. As the world has seen, armed forces from all over the world became guardians of private economic interests, usually the most privileged sector of society. This can also be interpreted as a concession that the civil State made to the armed forces in order to keep their stability, even though there were episodes of political repression across all of the XX century, and it was a sign of their lack of political legitimacy. As Serrano establishes: "Military intervention in the political arena is often the result of the incapacity of civilian elites to build and consolidate stable political institutions".<sup>437</sup>

Although Ronfeldt stated that there would be an increase of nationalistic policies and independence from the US, which would create a rise in tension between the U.S.-Mexico relationships,<sup>438</sup> the fact is that since the De la Madrid administration (1982-1988), the Mexican state has subordinated itself to the American interests, opened their markets to foreign (mostly US) investment and signed agreements like NAFTA and the Merida Initiative in order to get financial help, and in exchange for economic reforms. The author also concluded that the military would not object to the strengthening of the state-economy, as long as it was a mixture where private enterprises could be preserved.<sup>439</sup> As it can be seen in the first chapter, the military has performed duties that tend to serve and protect private interests. The following Mexican federal administrations have had the same economic policies, and the militarisation of civilian spaces has been increasing gradually. This is not implying that the army is on the streets to protect the economic

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<sup>436</sup> *ibid* 20-21

<sup>437</sup> M. Serrano, "The Armed Branch of the State: Civil-Military Relations in Mexico" (1995) 27(2) *Journal of Latin American Studies* 423, 426

<sup>438</sup> D. Ronfeldt (n 435) 21

<sup>439</sup> *ibid* 23

policies of the State, but it illustrates how the economy has played a fundamental role in establishing a friendly relationship with the US, even among the current domestic security crisis.

In the year 2000, Mexico made its first democratic State transition, as the conservative National Action Party (PAN) won the federal elections after 71 years of PRI governments. The new administration did not make significant changes the way the State had been organised and Mexico kept their military institutions without significant reforms. Benítez states that the same undemocratic practices continued, as he establishes that the president continued to be the “big decision maker and the armed forces kept their autonomy (from civilian influence) and avoided the intervention of inexperienced civilians”.<sup>440</sup> For this reason, there was no military change of attitude towards the Mexican new political era, as their interests were kept intact.

Academics state that the previous model of domestic civil-military relations evolved into the militarization of society. Arzt defines what can be understood as Militarization:

...A process that includes three connected elements: first, the increase of the military (active or retired) in duties and spaces that is of civilian competence..... the second (element) would be the increase in the participation of the Mexican Armed Forces in strategic decisions in national and public safety policies, without the right escort of civilian counterparts, and the third (element), would be the growth of financial and material resources to the different instances where these martial elements are gathered, but that are in close entailment with the National Defence and Navy Secretary.<sup>441</sup>

By its part, Astorga establishes that the political opposition stated about the dangers of a perceived militarisation in the justice system as early as year 2000, when ex-president Fox named an ex-military prosecutor (Rafael Macedo de la Concha), as the head of the General Procurator of the Republic.<sup>442</sup> Even though Macedo sporadically used the military in certain antinarcotic operations,<sup>443</sup> it would

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<sup>440</sup> R.G. Benítez Manaut, *The Administration of Defence in Latin America Volume II: National Analysis* (Instituto Universitario General Gutiérrez Mellado, Universidad Estatal a Distancia, Madrid 2008) 19

<sup>441</sup> D. Ronfeldt (n 435) 3

<sup>442</sup> L. Astorga, *Security, traffickers and military. The power and the shadow* (Tusquets, Mexico 2007) 63-64

<sup>443</sup> C. Resa Nestares, “The Trade of Illegal Drugs in Mexico” *Notas de Investigación* (May 2003) <[https://www.uam.es/personal\\_pdi/economicas/cresa/nota0503.pdf](https://www.uam.es/personal_pdi/economicas/cresa/nota0503.pdf)> accessed 6 May 2016



not be until Felipe Calderón's term (2006-2012), when the military would be used as a permanent aid to civilian forces.

Another component of the military's permanent deployment was civil assistance. This is composed of specific tasks that are set out to launch social development in areas with high levels of poverty and exclusion. It has been interpreted as political job done by the army on behalf of the federal government. Although analysts have described civic action as "apolitical functions for the political leadership"<sup>444</sup>, this is questionable; as such missions are clearly designed as part of a government's social policies and cannot be detached from its ideological aspect.

### **3.2.6 Contemporary military control in Mexico**

As we analyse the current Mexican context, questions arise about the liability of the Mexican State itself. Huntington stated that weak institutions have severe problems developing strong mechanisms of civilian control. According to this author there are two kinds of society, "civic" and "praetorian".<sup>445</sup> The first one involves a system with low levels of political participation but a strong institutionalization; the second one is characterized by a higher involvement of civilians in politics but a weaker institutional tissue. Huntington continues explaining that in praetorian societies people would protest either through positive or negative channels and these might consist in corruption, protests, mobs or coups. While this classification might be accurate, it falls short of explaining current contexts like the one in Mexico -which has proven to embrace corruption as a form of political system, and also has opposition from students, trade unions, and other social actors who engage in opposition in protests-, but has also proven to have long-lasting institutions. We have established before that Mexican society went through the twentieth century co-existing with a State system of vices, yet their institutional system never went through severe crises like most of Latin American societies.

Two methods for military control have also been established. The Subjective Control theory states that the military will be subjected to the monitoring of the civilian population at every level and stage; this means guarding even their internal affairs. The former tends to make the armed institutions move to civilian ones.<sup>446</sup>

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<sup>444</sup> Ai Camp (n 409) citing Dziedzic 1982, 198

<sup>445</sup> M.C. Desch, *Civilian Control of the Military, The Changing Security Environment*, (The John Hopkins University Press, Baltimore 1999) citing Huntington 1968, 9

<sup>446</sup> *ibid* 10

The other theory is Objective Control; this one establishes that the civilian State gives a relatively complete freedom to the military, in exchange for their total subordination.<sup>447</sup> Mexico has been following the Objective theory since the new State was created after the revolution. Such theory contrasts with the new democratic system of the European models, but the Mexican case is far more negative. As we have previously stated, the military was subordinated to the authorities in exchange for political positions and passive tolerance of the repression against civilian groups who opposed to PRI during the twentieth century. This has resulted in a highly undeveloped accountability culture inside the armed forces, as General Cienfuegos addressed in a 2015 interview, regarding the investigation on the disappearance of 43 students<sup>448</sup> in southern Mexico, stating: “I cannot allow my soldiers, who did not commit any crime, to be interrogated”.<sup>449</sup> The next part of this chapter points at the most important issues which the military is facing, in order to achieve a democratic system of accountability and civil-military relations.

This topic illustrates how the Mexican State has given the army a complete freedom, which has resulted in impunity. Independence between the State and the armed forces is positive, when there is a strong civilian control over them. This is an issue which will be explained with more depth in the next chapters, as the lack of controls have created a culture within the military that has not been rooted in democratic principles.

### **3.3 Flawed points of the Mexican army**

#### **Undeveloped mechanisms for accountability, transparency and access to information**

Lack of accountability and corruption is also due to the military monopoly over the administrative functions. This is not only shared by the political opposition, but also by specialists and intellectuals that have followed the development of

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<sup>447</sup> *ibid*

<sup>448</sup> For more information, refer to the investigation on this case conducted by the Interdisciplinary Group of Independent Experts (GIEI) titled “Ayotzinapa Inform II: Progress and new conclusions on the investigation, search and attention to the victims” (GIEI 2016), <http://www.oas.org/es/cidh/actividades/giei/GIEI-InformeAyotzinapa2.pdf>, accessed 9 May 2016.

<sup>449</sup> “I won’t allow my soldiers to be interrogated” for the Ayotzinapa case: Cienfuegos” *Aristegui Noticias* (Mexico City 6 October 2015) <<http://aristeguinoticias.com/0610/mexico/no-voy-a-permitir-que-interroguen-a-mis-soldados-por-caso-ayotzinapa-cienfuegos/>> accessed 9 May 2016

security institutions in Mexico. As R. Benítez noted, one of the only times that the army exercised their *veto power* in order to stop an official action, was when a Commission for the Clarification of Facts from the Past was created.<sup>450</sup> This was done in order to prevent army officials from being prosecuted.

Arzt establishes that one of the main issues with the militarization of public security in Mexico is the lack of a mechanism that would enable the monitoring of the army's actions and "measure the real impact that is generated to mitigate criminality".<sup>451</sup> Although the army has been submitting data to the general public, it is still unknown how effective the strategy is, comparing the use of the army with the use of civilian forces. Although the Fox government set up the Transparency and Access to Governmental and Public Information Law, it states that national and public safety will be kept in reserve.<sup>452</sup> The articles at issue state the following:

*Article 13: Information can be classified when its broadcasting can: Compromise national security, public security of national defence....*<sup>453</sup>

The current law contains a provision, which in theory prevents certain information from being reserved:

*Article 14, fraction VI: "...The character of reserved cannot be invoked in the case of the investigation of serious violations of fundamental rights and crimes of less humanity."*<sup>454</sup>

Even though the former provision should be enough to allow most of the current trials against military personnel to issue public information, the names and details of the current investigations in military courts are still reserved, as it was established in the first chapter.

The former article could be interpreted as the legitimate need of the State to preserve some information, for national security, although keeping every detail of

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<sup>450</sup> R. Benítez Manaut (n 440) 31

<sup>451</sup> S. Arzt, *The militarization of the General Attorney of the Republic: Risks for Mexican democracy* (Center of U.S.-Mexican Studies, La Jolla 2003) 3

<sup>452</sup> *ibid* 12-13

<sup>453</sup> "Transparency and Access to Governmental and Public Information Law" (*Cámara de Diputados del H. Congreso de la Unión*) <<http://www.diputados.gob.mx/LeyesBiblio/pdf/244.pdf>> accessed 05 January 2013

<sup>454</sup> *ibid*

the military criminal files and military personnel from the public does not fit with democratic principles. This law needs to be reformed jointly with the emergence of a new accountability mechanism. As with the recent reform to constitutional article 29, the success of current accountability mechanisms depends on the political will of the State to investigate and request information from the military. At the moment, even the GIEI, which is a creation of the Inter-American Committee on Human Rights, have not been able to access requested information (informs, binnacles and documents) from the National Defence Secretary regarding the Ayotzinapa case, not only denying information to the GIEI, but also to the General Procurator of the Republic.<sup>455</sup> There needs to be the political will to request information, and also to penalise and also investigate the military bureaucrats who are denying it, as at a domestic level this violates the Mexican Army Code of Conduct, whose Transparency principle establishes that the military must “allow and guarantee access to governmental information”;<sup>456</sup> and constitutional article 6(1), which establishes the public quality of all governmental material.

#### *Impunity for complaints on human rights violations*

Arzt does not give a deep explanation about this issue, but the lack of a strong civilian counterpart to the armed forces makes it difficult to guarantee respect to human rights in security duties (not even civilian forces have developed the needed figures to prevent abuse). Astorga has also established that civilian complaints against the military for violations to human rights, arbitrary detentions and rapes have been presented,<sup>457</sup> also establishing that the history of the army’s deployment for counterattacking the drug cartels in the 1970s had been negative, as no kingpins were captured, and the military’s presence created animosity against them in certain parts of the country.<sup>458</sup>

#### *Lack of coordination with civilian institutions*

Ai Camp enlists three points that influenced the relationship between certain officers and members of the civilian government. The first one is the Presidential

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<sup>455</sup> “Ayotzinapa Inform II: Progress and new conclusions on the investigation, search and attention to the victims” (GIEI) p. 140 <<http://www.oas.org/es/cidh/actividades/giei/GIEI-InformeAyotzinapa2.pdf>> accessed 9 May 2016

<sup>456</sup> Mexican Army Code of Conduct 2002 (MEX)

<sup>457</sup> L Astorga (n 442) 105

<sup>458</sup> *ibid* 193

Mayor State, which can be described as the president's personal security body. Camp states that 3 of every 10 superior officers in the last 30 years have been part of such group. The second point is the security task in the most important embassies, in which a certain group of officers have been committed to escort relevant politicians. The third point is the membership of the Army or National Defence mayor state; inside this group numerous relationships are created between military personnel and powerful members of the federal government.<sup>459</sup> Although institutional cooperation between the military and the political sphere has been positive in practical terms (for the control of civilians, but, as stated previously, not for intra-personal relations), since the creation of the modern State, military personnel had never interacted with the common citizen until the war against drugs began. The same author states that the lack of professional civilians inside the military has also made civilian influence less strong, even though soldiers share the public space at the moment. Astorga establishes, that when the army is employed in security matters that belong to civilian forces, the natural evolution of the State's civilian structures is obstructed and the military are given powers which could undermine the democratic process in the future,<sup>460</sup> implying that the civilian power decreases with the presence of military personnel in civilian security tasks

As a consequence of the army's civil detachment, politicians rarely understand everyday needs of the soldiers. This is explained by a military commander:

*The government has always maintained (the armed forces) isolated from the civilians by fear of political consequences of such contact. The last five or six presidents have not known us that well, and that has an extraordinary impact over who is elected or assigned to the highest positions. In other words, the same military has more power over this decision than the president, due to the lack of personal touch with the high rank officers.*<sup>461</sup>

Such statements paint Calderon's decision for public deployment even more irrational, as clearly there is a lack of knowledge and control.

It can be suggested that the armed forces' current absence of control and accountability deficit is a shared responsibility. The State's lack of communication

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<sup>459</sup> Ai Camp (n 409) 140-141

<sup>460</sup> L. Astorga (n 442) 105

<sup>461</sup> Ai Camp (n 409) 486

was very comfortable for the military commands, who at the same time restricted the personnel from discussing their inside life. As an officer has stated:

*....it is true that we don't have any social contact..... I'm being serious; they don't want us to talk with anyone to prevent making comparisons between our life and civilian life. In fact, I cannot think of any other army in the world in which this separation is more pronounced. During our development we have been intentionally isolated from the civilians.*<sup>462</sup>

It is clear that the lower ranked soldiers feel separated from society. This can be attributed to the fact that there is no figure which will serve as a link between the lower ranked personnel and society. It has been simpler for the higher commanders to have direct contact with society, because, as it has been addressed in this chapter, they have been given political positions and have always had a very stable relationship with the civil State.

#### Concentration of power in the higher commanders

The lack of inside information has allowed high rank officers to accumulate vast power in decision-making and subordination. To illustrate the immensity of the power gathered by the higher commanders it must be pointed that during the López Portillo administration, the Defence secretary -Felix Galván-, was the one and only public servant who could give authorization to the US army for flying over Mexican territory. Another officer with a lower rank once gave the same authorization without the secretary's licence, and he was jailed for three days as a consequence.<sup>463</sup> An officer that was told off by the sub-secretary for "thinking too much", recalls: "Indeed, in this country the Defence secretary is like a small god, in the sense that he can send some here or there, or change his position, without any existing appeal at all".<sup>464</sup> The former illustrates the level of repression from the higher commanders to the lower ranking sector of the army. Again, a lack of a figure that will listen and work on the complaints and issues of military personnel has left the common soldier with no resources to make his voice heard.

#### Institutional fragility

The lack of a civilian political culture has kept the governments away from the pressure needed in order to build strong mechanisms which would enable a

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<sup>462</sup> Ai Camp (n 409) 486

<sup>463</sup> Ibid, citing Dziedzic 1982, 244-245

<sup>464</sup> ibid 245

better understanding between current parties in conflict. To illustrate how contradictory the Mexican military discipline is in relation to the values of western democracies the following must be noted: an officer who asked to remain anonymous stated: “I remember that once the Defence sub-secretary told me that I had a problem. I asked the general what it was. He told me that I thought too much, “and in this army we don’t think””.<sup>465</sup> As Samuel Huntington explains, military discipline sets the individual in second place after society, whilst also developing a system based on hierarchy, order and function division, as well as underlining the permanency of irrationality.<sup>466</sup> Based on these concepts, it could be stated that the liberal democracy which Mexican society won after PAN took power in 2000, after 71 years of uninterrupted PRI governments, took a step back with Felipe Calderon’s decision to put an institution whose principles are contradictory with modern political values, as the safeguard on civilian security.

Mexico has developed a civil-military situation that has differed from the rest of Latin America. While countries like El Salvador, Uruguay, Chile and Argentina experienced military dictatorships during the twentieth century, Mexico started to build civilian institutions after the revolution began in 1910. In part -as it was explained in the first chapter-, this was accomplished by creating an authoritarian “network”, which was controlled by a single political party (PRI), whose “centre” condition made possible the incorporation of representatives from all segments of society. It can be established that one of the main reasons for which PRI managed to keep their legitimacy (at least until the questioned election of 1988), was that its members were the inheritors of the revolution, like Fr. Brandenburg states, they represented “*familia revolucionaria*” (revolutionary family).<sup>467</sup> Academics at that time suggested that, contrary to most of Latin America between the 50s-80s, Mexico was not in danger of a military coup due to the fact that members of every social layer were represented in the PRI, and to the system’s ability to resolve conflicts without destabilizing the State institutions.<sup>468</sup> Mexican politics in the twentieth century were considered unique; the main issue was the corrupt dependence of every state institution on the political class.

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<sup>465</sup> Ai Camp (n 409) 245

<sup>466</sup> Huntington (n 385) 79

<sup>467</sup> Ronfeldt (n 435) citing Brandenburg 1964, 12

<sup>468</sup> Ronfeldt (n 435) 12

An ironic aspect to this situation is that, even though military officers were given political positions during a large part of the twentieth century, the armed forces' position in the federal congress is very weak compared to more developed political systems. At the moment, the sole representation in the legislative is the National Defence committee, which is composed by deputies from different political parties. Samuel Fitch states that this is common to Latin-American regimes. In the Mexican case, the lack of military representation in congress lasted for 60 years (1930-1990)<sup>469</sup>; this made it impossible to request data and general information from the army, which explains why high rank officers show reluctance for any accountability reforms.

Analysts who worked for the party also stated the need for judicial reforms to grant independence in trials. They stated that past reforms have been mere patches that were not the solution for the roots of the issue, which according to them should be "the establishment of tribunals that will have independence and autonomy in order to issue their own judgements, endorsing a correct handling of justice inside the Mexican army, preserving the principle of discipline as its spinal cord and ensuring the right to access to justice for all the citizens".<sup>470</sup> Even though, as it has been said in the first chapter, recent reforms have allowed civilian courts to try military personnel in the case of human rights abuses (such reforms were done after PRD's statements); this has not resulted in genuine judicial independence, and as the left-wing stated, it has not solved the root of the accountability problem.

Mexico's military institution has also been damaged by a failed bureaucratic denomination. The PRD -through a recent analysis-, has stated that the Defence Secretary contains three different attributions. It operates at a field level, but also at an administrative (the analysis points out the need for a civilian figure to manage the army from an administrative outlook that would only leave the operative tasks to the military personnel) and judicial level.<sup>471</sup> The current status of the secretary violates the separation of powers -one of the Mexican State's principal values-; executive and judicial powers are meant to be totally independent, but the army currently has

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<sup>469</sup> JS Fitch, "The Armed Forces and Society in South America: How similar? How different?" (Research and Education in Defense and Security Studies conference, Santiago October 2003)

<sup>470</sup> VL Unzueta Reyes "Civil-military relations: the pending reform" (*Diputados PRD*) 8 <[http://www.diputadosprd.org.mx/debate\\_parlamentario/articulos/LXI\\_2010\\_6\\_16.pdf](http://www.diputadosprd.org.mx/debate_parlamentario/articulos/LXI_2010_6_16.pdf)> accessed 06 February 2013

<sup>471</sup> *ibid*



both attributions. As it has been stated in the first chapter, a recent reform allows civilian tribunals to judge military personnel who violate human rights; unfortunately, the referenced reform suffers from ambiguity and leaves a wide criminal spectrum at the hands of the military judicial system.

### **3.4 Equality, pre-trial procedures and contemporary human rights standards**

The international foundation of contemporary standards on equality and pre-trial procedures is found in article 14 of the ICCPR, in which the General Committee has set minimum essential rights for a person from the moment of his detention until his trial comes to an end. As the Committee has established, article 14 does not only apply in the moment of determining the criminal charges of a person, but “also to procedures to determine their rights and obligations in a suit at law”.<sup>472</sup> For this reason the State parties have the obligation to determine such concepts in an intricate form, which the Mexican State only did recently with the adoption of important reforms to the Military Justice Code, as there was a gap that prevented even the minimum standards of contemporary human rights frameworks to be applied to the victims of military personnel. On this subject, the Committee has stated that various states have had trouble in understanding that, while the Covenant does not forbid special courts, it does indicate that “the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated”<sup>473</sup> Although Mexico became a State party since 2002, it took 12 years of both domestic and international pressure to motivate the executive and legislators to develop legal changes.

The Human Rights Committee has established that not only criminal legal frameworks which apply directly to the security conflict in Mexico like the AMHR are relevant, but also the UN Guidelines on the Role of Prosecutors (especially the 13<sup>th</sup> point)<sup>474</sup>, are especially relevant in cases like the Guzman brothers’ one, as it states that the prosecutors have the obligation to “consider the views and concerns of

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<sup>472</sup> UNCHR “General Comment No 13, Article 14” in “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies” (1984) 21<sup>st</sup> session (2001) UN Doc HRI/GEN/1/Rev.1 at 14 [2]

<sup>473</sup> *ibid* [4]

<sup>474</sup> This was established by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990. As the document states, such guidelines were developed to promote and secure “...effectiveness, impartiality and fairness of prosecutors in criminal proceedings...”, “Guidelines on the Role of Prosecutors 1990” (*United Nations Office of the High Commissioner for Human Rights*)  
<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>> accessed 13 March 2013

victims when their personal interests are affected and insure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”.<sup>475</sup> This last document is especially important to incorporate in this discussion, as the complaints of victims like the Guzmán brothers’ father were based in the lack of cooperation from both civilian and military prosecutors. The Declaration was adopted in 1985 by the UN General Assembly, and it dedicates a part to the provisions that should be given to the victims in order to access justice and an adequate treatment. In particular, the annex about Victims of Crime establishes in its principle 6 that such victims should be informed of all the details of the process and the disposition of their respective cases, especially where their interests can be directly affected. This principle also states that an adequate assistance should be provided to the victims. This is relevant to the current system of gathering evidence in Mexico, as according to Human Rights Watch, in various cases, the relatives of the victims have been accused themselves for having some degree of participation in the crimes committed against their relatives.<sup>476</sup>

To establish the level of harassment from the military authorities towards the victims, it is appropriate to mention a brief example. Claudia Janeth Soto Rodríguez was taken to an investigator from the Military Prosecutor’s Office who asked her to give details about the disappearance of her husband. As the HRW report states, she felt very threatened to be in a military base, as she had accused the National Defence Secretary as a participant in the disappearance in the past. The agent that interviewed her made various intimidating questions and at the end of the interview the military investigator threatened her.<sup>477</sup> The former conduct violates article 5 of the American Convention on Human Rights (right to humane treatment), which among its provisions establishes the inherent right that every person to have a treat that avoids any inhuman, cruel or degrading conducts, as well as having his mental, moral, and physical well-being respected by the State.<sup>478</sup> The statement that verbal abuse and intimidation constitutes a form of violating the right to humane treatment, has been established by the Inter-American Court on the *Raquel Martín de Mejía v. Perú* case (no. 10.970), in which the Court stated that in order to

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<sup>475</sup> *ibid* [Guideline 13 point C]

<sup>476</sup> Human Rights Watch (n 4) [40]

<sup>477</sup> *Ibid* [81]

<sup>478</sup> American Convention on Human Rights 1969 art 5

establish that *torture* has been committed, there are three key elements: “1) it must be an intentional act through which physical and *mental* pain and suffering is inflicted on a person; 2) it must be committed with a purpose; 3) and it must be committed by a public official or by a private person acting at the instigation of the former”.<sup>479</sup>

Therefore, even though the Mexican military investigator’s behaviour against Ms. Soto Rodriguez did not constitute torture, it violated article 5 by mentally harassing her with the clear intention of making her stop in her search for her disappeared partner, because there were various precedents of the family trying to file complaints through the Federal Prosecutor’s Office (General Procurator of the Republic) (AP/PGR/COAH/TORR/AGII-I/178/2009), and the state’s prosecutor’s office (LI-H3-AC.007/2009, April 24, 2009). HRW documented all the errors that the authorities committed on Uribe’s case; these included: “failing to promptly secure the crime scene, which allowed crucial evidence to be damaged and removed; refusing to open a prompt investigation into the crime; passing the case back and forth between state and federal prosecutors; misplacing key evidence; failing to conduct adequate forensic analysis; and, in one instance, even lying about having conducted an interview or at least mistaking the identity of an interviewee in official records.”<sup>480</sup> These violations not only violate article 5 of the American Convention, but the right to liberty and security of a person, established in article 9 of the ICCPR.

The behaviour shown by the military investigator while questioning the relatives of Mr. Uribe, like the tactic of intimidation to relatives in order to stop them from requesting justice when military personnel has been involved in a human rights abuse are breaches of article 14 of the ICCPR. The delays on military investigation also prevent the victim from arriving to the stage of a trial, which would constitute a violation to article 8 of the American Convention (right to a fair trial). The provisions contained in the Convention open a legal path for these types of victims in a broader sense that other HR conventions, as its article 44 states that “*Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party*”<sup>481</sup>; these would mean that even if the petitioner is not a direct victim, he/she

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<sup>479</sup> *Raquel Martín de Mejía v. Perú* (Judgement) IACtHR Case 10.970 (1 March 1996)

<sup>480</sup> Human Rights Watch (n 4) [47]

<sup>481</sup> American Convention on Human Rights 1969 art 44

might still be entitled to put the complaint. Another important point to make here is that the commission has to consider such petition, being that only they (or a member State), have the faculty to submit it to the court.<sup>482</sup> The case of the Guzman brothers (which has been described in detail in the first chapter), would also be in total contradiction with article 9 of the ICCPR, as such article is the foundation that protects civilians from arbitrary detention, and assures them personal security. Joseph, Schultz, and Castan state on their analysis of article 9 that there is a clear distinction which is the right that every State has to arrest a citizen as a legitimate policy of control, and the deprivation of freedom on an unlawful or arbitrary way.<sup>483</sup> Until the reform which was voted the 24<sup>th</sup> of May of 2014, Mexican civilians had no legal path for denouncing arbitrary detentions by military personnel, as their jurisdiction left them out of any part in the process. On the cases of Isaías' wife, the threats made to her by a military investigator would also be violating article 9 of the Covenant, as the IAHRC determined in the *Páez v Colombia* case (no 195/85), that imprisonment is not strictly needed to jeopardize the safety of a person. The court established that the State must interpret article 9 in a broader sense, so that they cannot ignore life threats to their citizens.<sup>484</sup> In the specific case of Claudia Soto, she was not specifically life-threatened, but it could be inferred that she could fear for her life, due to the enforced disappearance of her husband at the hands of the same institution that threatened her.

The lack of commitment to the ICCPR from the Mexican armed forces has been well documented by Human Rights Watch, as they have stated that the military prosecutors are unsuccessful on opening investigations or to even conduct the proper preliminary stages, such as enquires,<sup>485</sup> this is crucial to collect evidence as the crime has just been committed. There is a much more urgent issue when civilians are arrested and kept in military facilities for days or even weeks; the new reform makes it compulsory for the military to immediately refer to civil jurisdiction any case in which a civilian is involved,<sup>486</sup> so the outcome at a field level is still to be seen at the time of this writing. Before this reform, the arrest of civilians and its

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<sup>482</sup> American Convention on Human Rights 1969 art 61(1)

<sup>483</sup> S. Joseph, J. Schultz, M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2<sup>nd</sup> edition, Oxford University Press, 2004) 304

<sup>484</sup> *Páez vs. Colombia* (IACtHR no. 195/85) [5.5]

<sup>485</sup> Human Rights Watch (n 4) [35]

<sup>486</sup> Military Justice Charter 23rd April 2014, Republic Senate – LXII Legislature 231

imprisonment in facilities which had no jurisdiction over them, contradicted article 14 of the ICCPR,<sup>487</sup> which according to Joseph, Schultz, and Caspan, not only applied in the administration of justice by the police, but also to prosecutors,<sup>488</sup> which in subject of the illegal imprisonments and arrests made by the Mexican armed forces, meant that situations like the interrogation and threatening made by a military prosecutor to Claudia Soto were incompatible with article 14, as such state agent had no jurisdiction over her or her husband for that matter. On this topic, the Human Rights Committee has established that the principle of equality before the law “mean not merely equality between one citizen and another but also equality of the citizen vis-à-vis the executive”.<sup>489</sup>

It can be seen that Mexico’s legislation has complied with the essential standards for investigations, but a lack of action from the investigators, both military and civilian, have prevented victims like Claudia Soto and her family from accessing justice. The 2014 Military Justice Code reform has not had needed impact, because the civilian authorities are slow and have not carried on with the investigations with the required urgency.

### **3.5 The judiciary power should have the monopoly of the authority to elaborate judgements which are within its jurisdiction.**

At an international level, the most important human rights charter was developed in 1988 by the UN General Assembly (The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment). It mentions among its principal points that the “inherent dignity of the human person” should be essential during the state of arrest.<sup>490</sup> The rest of the principles establish the values that should be respected during the whole process starting with the detention, custody and stage of investigation. The fact that most of the victims get arrested without a warrant and are simply taken to military bases without giving proper information to their relatives –even when they are present at the moment of

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<sup>487</sup> ICCPR, Article 14 (1) –“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”

<sup>488</sup> S. Joseph, J. Schultz, M. Castan (n 483) 395

<sup>489</sup> McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press, 1994) citing Tomuschat on Poland Summary Record 187[26], 397

<sup>490</sup> UNGA “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment” (9 December 1988) 76<sup>th</sup> session (1988) UN Doc A/RES/43/173, principle 1

the arrest-, contradicts the American Convention on Human Rights, which Mexico is a member of. This legal framework establishes in its article 5 the “Right to Humane Treatment”<sup>491</sup>, that establishes the obligation of the State of protecting and respecting the dignity of any person that has been deprived of their freedom (Monroy Cabra addressed that this right has been a result of recognising human dignity, and it harmonises with articles 7 and 10 of the ICCPR<sup>492</sup>).

This is relevant to the context of the severe human rights abuse that various civilians have suffered at the hands of the military in the context of the war against drugs, as even underage citizens have been objects of degrading treatments. To put an example of the last statement, HRW documented the sexual abuse of four girls who were arrested during an operation in which hundreds of soldiers who were seeking for the aggressors of five soldiers in the state of Michoacán in 2007.<sup>493</sup> The underage girls stated that they were forced onto a helicopter where the sexual, physical and psychological abuse took place; after the abuse, they were taken to military facilities, in which they were fed an unknown chemical substance which caused them to lose consciousness. After waking up, they suffered from terrible pains in their bodies, apart from noting different kinds of fluids in their mouth, nose, and genitals.<sup>494</sup> The whole situation was documented by the civilian ombudsman and established in the recommendation 38/2007, and instructed the National Defence Secretary to investigate and sanction the crimes which have been committed according to the evidence gathered. On the public file available on the Secretary website, it is stated that the recommendation has been received and an investigation was started, but it was established there was lack of evidence to try any military personnel.<sup>495</sup> As in most of the other cases, the file does not state any other kind of details.

Contemporary legal obligations also establish the rights that citizens need to be granted during the pre-trial detention. Article 7 of the American Convention on Human Rights (right to personal liberty), establishes that no citizen can be subjected to any type of arbitrary detentions; it also states that all information about the cause

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<sup>491</sup> American Convention on Human Rights 1969, art 5

<sup>492</sup> M.G. Monroy Cabra, “Rights and Duties Established by the American Convention on Human Rights” (1981) *The American University Law Review* 30, 29

<sup>493</sup> Human Rights Watch (n 4)

<sup>494</sup> *ibid*

<sup>495</sup> National defence secretary (n 288)

of an arrest should be given, and a reasonable limit of time to decide if such citizen will be subjected to a trial being deprived of its liberty, or if legal guarantees to provide his subsequent appearance in court will be provided. In case that such citizen considers that his arrest has been unlawful, he can resort to the correct court in order to determine the matter. The Inter-American Commission on Human Rights had already established recommendations to the Mexican State on article 7 of the American Convention, as they had received complaints of unlawful detentions;<sup>496</sup> the Commission recommended to “adequately regulating the principle of freedom of the accused during the trial phase, providing for specific exceptions in accordance with the guidelines laid down by the IACHR”.<sup>497</sup> The guidelines referred in this recommendation are the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, as principle III establishes the conditions and circumstances in which a citizen can be legally deprived of his personal liberty.<sup>498</sup>

The Human Rights Committee has established that the State parties must develop measures which will ensure the prevention of enforced disappearance, which the Committee states, often leads to deprivation of life. For this reason, the State has the responsibility to investigate and provide facilities to establish responsibilities in events where people go missing, and in which the violation of right to life might be involved.<sup>499</sup> It should be noted that the right to life is not an absolute right, and the right of proportionality must be taken into account, as the State cannot go further than what is humanly possible to achieve in order to protect its citizens.<sup>500</sup> Therefore, this research has only selected cases of study where there are elements to establish that gross human rights violations have taken place.

The behaviour of military personnel with the suspects also contradicts the principle of the presumption of innocent until proved guilty; such principle has been established in most domestic and international criminal systems, such as the ICCPR

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<sup>496</sup> Organization of American States “Inter-American Convention on Human Rights, Report on the Situation of Human Rights in Mexico” OAS Doc No 44/15 (31 December 2015) OEA/Ser.L/V/II., ch II

<sup>497</sup> Ibid, ch III

<sup>498</sup> Inter-American Commission on Human Rights “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas “ (13 March 2008) 131<sup>st</sup> session OAS Doc 1/08, principle III

<sup>499</sup> UNHRC, General Comment No. 6, Article 6: Right to Life, (30 April 1982) 16<sup>th</sup> session, UN Doc HR\GEN\1\Rev.1 at 6, [4]

<sup>500</sup> *Osman v The United Kingdom* App no 87/1997/871/1083 (ECtHR 18 October 1998) para 116

(art 14[2]), on which the HRC establishes that such provision “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle”.<sup>501</sup> The rationality behind the principle of a fair trial is also based on the theory which states that the judge’s decision must be elaborated through a well-thought analysis based on facts and legal groundwork, without external pressures or influences. The judiciary power should have the monopoly of the authority to elaborate judgements which are within its jurisdiction.

### **3.6 Case studies**

The following cases were selected because they exemplify the current issues that civil-military relations in Mexico face. In order to establish the main points, a brief description of the background and facts is addressed; plus, the relevant domestic and international provisions that can be applied to them are established. The purpose is to demonstrate the legal and instructional flaws that have allowed severe violations of human rights to go unpunished.

#### **3.6.1 Case study 1**

##### *The Guzmán Zúñiga brothers’ case*

On the 14<sup>th</sup> of November of 2008, neighbours saw a convoy of federal police and military personnel on the city of Ciudad Juarez, in the state of Chihuahua, Mexico. The federal police surrounded the house while the soldiers came inside. A few minutes later, the same witnesses saw the soldiers taking Carlos and José Luis Guzmán away in military vehicles; their current whereabouts is unknown.<sup>502</sup> The family of the Guzmán brothers went to the headquarters of the 20<sup>th</sup> Motorized Horsemen Regiment of Ciudad Juarez, to investigate and try to get any information from military personnel, but did not get any response. After that they went to the civilian Chihuahua General Justice Procurator, but the personnel refused to give any help unless the family dropped any charges against the army.<sup>503</sup> After establishing this condition, the only help they offered was posting pictures of the

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<sup>501</sup> UNHRC, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, (23 August 2007) 19<sup>th</sup> session (2007) U.N. Doc. CCPR/C/GC/32

<sup>502</sup> Amnesty International, *Mexico: New Inform of Human Rights Violations at the Hands of the Army* (Editorial Aministía Internacional 2009) 12

<sup>503</sup> *ibid*13



missing brothers all over the city. With no other resource, they complained upon the Human Rights National Commission, whose investigation led to the issue of a recommendation.

The Human Rights National Commission arrived to the conclusion that the soldiers had in fact broken the law because the victims had not been arrested while committing any crime; they had also violated legal principles by not putting them under the jurisdiction of any established authority.<sup>504</sup> Such recommendation was accepted by the National Defence Secretary, but at the same time that they accepted the institution states, until the day of this writing, that a trial against 7 members for the charges of “abuse of authority” is on course, and no military personnel has been sentenced.<sup>505</sup> The governmental institution has not given any more public explanation about this evident contradiction (accepting a recommendation without establishing any responsibility to members of the army).

In order to establish international competence, first we need to discuss the following:

*Relevant frameworks that apply to this case*

The only public information of the current course of the trial that is available is a public PDF file which does not give any names or details, other than the number of military personnel being prosecuted, and the crime that they are being accused of: Abuse of Authority. Concerning this concept, the Military Justice Code establishes the following:

*Article 293. - Abuse of authority is committed by the military that treats an inferior in a way that is contradictory with legal dispositions. This crime can be committed inside or outside of service.*

It can be seen that the legal description of this provision does not correspond with the evidence that the Human Rights National Commission gathered on its recommendation, as the passive subject of art 293 (“an inferior”), is referring to another military personnel, not a civilian. In this case, the suspects were being

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<sup>504</sup> “Recommendation 2009/044” (Mexican Human Rights National Commission) <<http://www.cndh.org.mx/sites/all/fuentes/documentos/recomendaciones/2009/044.pdf>> accessed 30 October 2015

<sup>505</sup> National defence secretary (n 288)

investigated for a crime of a strict military discipline, but the passive was a civilian, so this article would not be applicable.

. Until the day of this writing, there is not an alternative inside the Mexican domestic law to initiate a trial in civilian courts (on 2012, the National Supreme Court of Justice declared article 57 of the Military Justice Code as unconstitutional, and established that all human rights violations committed by military personnel would be accountable within civilian courts, but the Mexican legal system requires five judgements with the same criteria applied for it to be established as jurisprudence, so it is still not compulsory).

Article 57 of the Military Justice Code established the crimes that are competent for the code, just stating (among others) the following: “*the ones committed by the military on the moments of being on duty or as a consequence of it*”. The article also states the monopoly of the military tribunals: “*when on the cases of fraction II, militaries and civilians concur, the first ones will be judged by military justice*”.<sup>506</sup> As it was stated before, the criteria of the National Supreme Court of Justice that would allow civilian courts to try military personnel is still not compulsory. Therefore, a domestic resource for human right abuses that can prove effective still does not exist.

The monopoly that the Mexican military has over military justice breaches the American Convention on Human Rights (which Mexico signed in 1981), specifically article 25, which establishes the Right to Judicial Protection and the right for a competent tribunal or court that ensures protection against violations of fundamental rights.<sup>507</sup> The Mexican State is also violating article 2, which states that a State that has signed the treaty does not guarantee its citizens total respect to the fundamental rights contained in the treaty, it should compromise to adopt legislative measures in order to meet the standards that the convention asks for.<sup>508</sup> Mexico is also not meeting the standards that the Inter-American Convention on Forced Disappeared of Persons (Mexico signed this agreement on 2002); its article I established the compromise of its members not to allow, tolerate, and practice forced disappearance of persons, not even when a state of emergency, or

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<sup>506</sup> Military Justice Code 2012 (MEX) art 57

<sup>507</sup> American Convention on Human Rights 1969 art 25

<sup>508</sup> *ibid* art 2

suspension of individual guarantees is decreed.<sup>509</sup> Article III also establishes an important point, as it states that forced disappearance will be considered to have a continued nature as long as the whereabouts or destiny of the victim is not established.<sup>510</sup> This last statement would in fact, be enough to present a case in the Inter-American Court of Human Rights, as until the day of this writing, the Guzmán brothers have not appeared –dead or alive-.

### **3.6.2 Case study 2**

*The murder of Sergio Meza Varela and the injuries against José Antonio Barbosa Ramirez*

On the 16<sup>th</sup> of February of 2008 in the city of Reynosa, Tamaulipas members of the armed forces opened fire against a vehicle with the intention of stopping it. Inside the car, Sergio Meza Varela was shot to death and José Antonio Barbosa Ramirez was severely injured. The National Defence Secretary later stated that the soldiers had shot their guns in order to repeal a fire arm assault, but later investigations established that evidence suggests that both men were unarmed at the moment of the attack.<sup>511</sup> The Human Rights National Commission investigated the event and issued a recommendation; they stated that excessive use of public force and fire weapons have been applied; this violated the fundamental rights related to juridical safety, physical integrity, and life, all protected in articles 14 and 16 of the Mexican constitution.

#### *Relevant frameworks that apply to this case*

As the local civilian authority is investigating the event at the moment, the Mexican domestic law must be exhausted first. The local prosecutor in Reynosa must apply the following articles from the state of Tamaulipas criminal code for the death of Sergio Meza Varela, which according to the evidence already gathered by the Human Rights National Commission would be the following: article 329, which describes homicide; article 330, which establishes the causal nexus of the homicide; article 336, which describes the concept known as *qualified homicide* (which would apply in this case because the evidence concluded that the military personnel had

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<sup>509</sup> Inter-American Convention on Forced Disappearance of Persons (entered into force March 28 1996)OAS Treaty Series No 68, 33 ILM 1429 (1994), art I

<sup>510</sup> *ibid* art III

<sup>511</sup> Human Rights Watch, *Uniformed Impunity: Improper use of military justice in Mexico to investigate abuses being committed during operations against drug trafficking and public safety* (Human Rights Watch 2009) 56

used fire weapons while the victims were unarmed; this article would also apply for the case of Jose Antonio's injuries); article 341, which applies to the case, because the soldiers did not shoot the victims to contest an assault, so it can be inferred that their actions were premeditated. In the case of Jose Antonio Barbosa Ramirez, the description about the concept of injuries are contained in article 319; article 321 would also apply to this event, as it describes the sanctions for injuries that would put the victim's life at risk, which according to the recommendation from the commission would apply to Jose Antonio; finally, article 322 would also be applicable, due to the disturbance in one of Jose Antonio's superior limbs.<sup>512</sup> While these should be the legal foundation in which the prosecutor should act, there is no denial that the lack of public information makes it impossible to see what the current criterion is.

According to the public file available from the National Defence Secretary, the civilian prosecutor took charge of the investigation on the 6<sup>th</sup> of July of 2012.<sup>513</sup> The investigation done by the human rights commission gathers enough qualified evidence to support a case for the local prosecutor, so it is suspicious why there is no new advances from the case made public. The behaviour from the army is even more obscure, as we have stated that, according to most updated public file, they have supposedly fulfilled the recommendation in its totality.

Regarding the international sphere, the commission also referenced article 6.1 of the International Covenant on Civil and Political Rights, article 4.1 of the American Convention on Human Rights, and article 3<sup>rd</sup> of the Universal Declaration of Human Rights, all of them which refer to the right to life.<sup>514</sup> The commission finished its recommendation instructing the National Defence Secretary to compensate and repair all the damages (which would include the physiological, medical, and physical aspects), apart from repairing the car that was damaged, and last but not least, instruct the secretary to start an investigation and sanction all the military personnel according to their degree of guilt in the event.<sup>515</sup> It should be noted the fact that in the public file made available to the public by the National

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<sup>512</sup> "Recommendation 2008/035" (*Mexican National Commission of Human Rights*) <[http://www.cpimexico.org.mx/portal/wp-content/uploads/2014/12/comunicaci%C3%B3n\\_22102012\\_versi%C3%B3n\\_p%C3%BAblica.pdf](http://www.cpimexico.org.mx/portal/wp-content/uploads/2014/12/comunicaci%C3%B3n_22102012_versi%C3%B3n_p%C3%BAblica.pdf)> accessed 30 October 2015

<sup>513</sup> National defence secretary (n 288)

<sup>514</sup> Recommendation 2008/035, Human Rights National Commission 12

<sup>515</sup> *ibid* 15

Defence Secretary, the military investigators opened a file (8ZM/05/2008), but then declined jurisdiction and sent the file to the civilian General Procurator of Justice of the state of Tamaulipas. The institution's website does not have any of their files publically available, and there has been no new advances reported on the news until the day of this writing. It should be noted that the military file that is publically available states that the recommendation issued by the commission is "totally completed".<sup>516</sup> According to this statement, the soldiers should have been sentenced for the crimes committed –as the commission instructed–, but the file does not list any personnel being processed or sentenced, as it also states the fact that the investigation is now at the hands of the civilian prosecutor.

These cases have established the lack of independence of the military investigators and the lack of resources that civilians have to access justice within the present military and civilian institutions, as the Human Rights National Commission does not have the needed level of enforcement to subject the military justice system to mechanisms of accountability. While the 2014 Military Justice Code reform establishes the faculty of civilian prosecutors to investigate military personnel accused of human rights abuses, the military justice institutions still handle the majority of complaints. Information requested to the National Defence Secretary from a newspaper on 2015, showed that of 4,525 soldiers that were being subjected to military trials, only 238 had been sentenced.<sup>517</sup> The fact that the civilian investigation units have conditioned their aid in exchange of protection for the army, line on the first case analysed, makes the intervention of international mechanisms of accountability more urgent, as the victims do not have access to functional and transparent institutions inside Mexico.

### **3.7 Conclusion**

At the moment of this writing it is impossible to predict what the Mexican outcome will be, as the constitutional article 29 has not been employed yet. As it has been addressed in this chapter, the reform has the requirements that the American Convention and the Paris Minimum Standards establish, but the wording of an essential sentence ("other that puts society in severe danger or conflict") can be subjected to debate. The lack of a strong government (a poll published on March

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<sup>516</sup> National defence secretary (n 288)

<sup>517</sup> J. Monroy "Only 238 sentences of 4,525 tried soldiers" *El Economista* (Mexico City 3 March 2015) <<http://eleconomista.com.mx/sociedad/2015/03/03/solo-238-sentencias-4525-militares-juzgados>> accessed 18 June 2016

2016, shows that current president Enrique Peña Nieto only has 32% of citizen approval<sup>518</sup>), and a legislative also with low legitimacy (in 2015 the chambers of senators and deputies registered 5.2 and 5.3 points respectively over a scale of 10<sup>519</sup>), does not constitute a strong precedent, as according to the reform, they are the powers that will establish a state of emergency. The Supreme Court of the Nation has powers to make decisions about the legality of the emergency provisions once they have been decreed, but this institution does not have a high reputation among the citizens either (it got a score of 6.3 over a scale of 10<sup>520</sup>). If emergency powers are established, the Mexican State would need to justify very carefully their decision, or they would be in risk of alienating a large part of society, a situation which would be severely dangerous for its current fragile democracy.

There is also the issue of the current deployment of the military; this deployment was established mainly on the basis of constitutional article 89 fraction VI,<sup>521</sup> which gave way for the issuing of the presidential decree that gave attributions to military personnel to perform security duties aiding civilian forces. In the recent constitutional reform, article 89 was not altered at all. Here, a necessarily question arises: can the issuing of the presidential decree be considered as an example of emergency provisions? How do the constitutional reform harmonise with the current security strategy?

The fact that the Mexican armed forces have been deployed to do police duties for a decade represents a severe problem in terms of State accountability. Gross has talked about the importance of setting a clear temporality when a state of exception is issued,<sup>522</sup> because the measures applied to the emergency might become normalised as time passes by,<sup>523</sup> and ultimately be incorporated into the

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<sup>518</sup> "Support for the work of President Peña Nieto decreases" *El Universal* (14 March 2016) <<http://www.eluniversal.com.mx/articulo/nacion/politica/2016/03/14/disminuye-apoyo-labor-del-presidente-pena-nieto>> accessed 9 May 2016

<sup>519</sup> "Mexico: Trust in Institutions 2015" (*Consulta Mitofsky: the poll preference*) <<http://consulta.mx/index.php/estudios-e-investigaciones/mexico-opina/item/575-confianza-en-instituciones>> accessed May 2016

<sup>520</sup> *ibid*

<sup>521</sup> Article 89: the faculties and obligations of the President are the following: VI – Preserving national security, in the terms of the corresponding law, and the disposal of the totality of the permanent Armed Forces, meaning the Army, the Navy and Aerial Force for matters of internal security and exterior defence of the Federation.

<sup>522</sup> O Gross (n 314) 1036

<sup>523</sup> *Ibid* 1072

legal codes, as the case of the prolonged *arraigo*<sup>524</sup> measures. The Mexican context is even more complicated to place within the juridical sphere, as a state of emergency has never been officially declared, and it was only until 2016, 10 years after the security strategy was issued, that the federal congress included the state of emergency figure in the constitution. This is all part of the problem that Greene has addressed, which is the current lack of a clear line between normalcy and emergency.<sup>525</sup> The author establishes that the judiciary must address the temporality of the emergency by putting special attention to the first paragraph of article 15 of the ECHR, specifically the phrase “threatening the life of a nation”, in order to establish at which point does the emergency cease to exist.<sup>526</sup> If this rationale is applied to the Mexican context, the Supreme Court of Justice of Mexico should take a proactive approach to the militarisation issue, and judge if the current security context requires the indefinite deployment of the armed forces.

The topic of civil-military relations also takes the discussion back to the legitimacy of the current regime. According to Feaver, the citizen plays the role of “ultimate political principal”<sup>527</sup> because society monitors their own armed forces, and this entails that the military as an institution must be held accountable upon society in first place. The deployment of military personnel on Mexican streets has created a conflict between society and the army, which has been increasing over the years; commanders and soldiers have been reluctant to work inside a system of accountability that would make society feel empowered. This has been a consequence of their deployment before setting a proper mechanism, not only legally-wise, but also at an institutional level. The denial of the armed forces to submit information which should be considered public, and the reluctance to let their personnel be interviewed by investigators proves that the army’s internal regulations, federal laws like the General Law of Transparency and Access to Public Information, and Mexico’s status as a State party of treaties like the ICCPR and the ACHR, are not enough to guarantee access to justice to victims of human rights abuses. If the institutions in charge of investigating and prosecuting do not show political will to provide justice, and if the armed forces as an institution refuses to subject themselves to the established mechanisms of accountability.

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<sup>524</sup> Political Constitution of the United Mexican States 2016 (MEX), art 16

<sup>525</sup> A Greene (n 310) 1766

<sup>526</sup> Ibid 1784

<sup>527</sup> PD Feaver (n 386) 284

The second part of this chapter has addressed the points that illustrate the civil-military relations conflict in Mexico. The Mexican military culture established along with the creation of the post-revolutionary modern State was founded without democratic principles, with a State that granted them impunity in exchange for recognition and impunity. It can be established that there was a non-written pact of impunity between the political class and the armed forces which did not change with the democratic transition that Mexico went through with the change of regime in the year 2000. The case studies occurred while the PAN party governed at a federal level (after all, it was a president from this party who deployed the army to fight drug cartels). The PRI party won the 2012 elections, but did not change the security strategy initiated by PAN. The importance of explaining the social context of civil-military relations is important in order to provide with the necessary cultural elements to make an appropriate comparative legal study at a later point of this research.



## Chapter IV

### **The German post WWII military reforms: a lesson for the Mexican case?**

The potential long-term impact of the recent military justice code reform in Mexico should not be underestimated, despite its flaws mentioned previously in this thesis. Hundreds of complaints against the armed forces in the last 7 years, plus the international pressure that international organisations put on the State, forced the legislators to make fundamental changes in military and civilian jurisdictions concerning the cases of human rights abuses where military personnel and civilians are involved. In this chapter, Germany has been selected as a comparison for the conducting of this research in terms of accountability and subordination as well as the status of the soldier with society, all this in addition to the strong civilian control over the armed forces that was developed as a reaction to move away from the Nazi regime and World War II. In this part of the chapter the post-WWII German military system will be examined and a comparison with the Mexican current system (including the new reform) will be established.

Why is Germany selected as a source of comparison with Mexico? The German army went through a re-foundation, along with the whole State, after WWII. The main areas where qualitative reforms were done were the areas of accountability and the soldiers' rights. This experience has been so enriching for the development of democratic civil-military relations, that parts of its system could be adapted for the Mexican context. In order to elaborate a comparative study between two countries with different historical contexts, the methodology selected for the study allows selecting parts of the legal systems which are functional in another, taking into account the cultural background and current context of the selected objects. As it has been addressed on this research, the Mexican soldiers are currently living among a strongly authoritarian military culture, which leaves no space for the soldier to act critically,<sup>528</sup> following orders which they might view as incompatible with the values that they are supposed to guard. This chapter will unpack key concepts that show the ethics and goals behind German contemporary military culture.

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<sup>528</sup> Ai Camp (n 409) 245

#### 4.1 The development of German contemporary militarism and the concept of dignity

After 1945 there was a rupture in German History, as according to Tewes civilian power had not been democratised, but after the end of WWII the emancipation of civil society from the State became a reality.<sup>529</sup> In the 1950s the Cold War climate created the need for the reorganisation of the military forces in West Germany; an agreement was reached in 1954 and the Federal Republic agreed to sign the North Atlantic Treaty. Such agreement stated that the Western Allies could re-occupy the West German territory if they considered it necessary, and in exchange the German State would agree to become part of the Western defence through the reorganization of its armed forces, called the *Bundeswehr*.<sup>530</sup> Behind the domestic constitutional problems in creating a new army in Germany the fear of recreating the Nazi experience existed, as Nolte and Krieger have established. The first half of the 20<sup>th</sup> century showed an authoritarian side of the German army which the new republic did not wanted to repeat.

Dyson establishes that the Bundeswehr has employed four principal elements that encompass the policy subsystem of this institution: The first element is the shared identity, which is based on the constitutional provisions that regulate national defence, the provisions and doctrines of the NATO command structure, and the *Innere Führung* (IF) and its concept of “citizens in uniform”. The second element is the policy learning, which means that members like the defence commissioner of the Bundestag, the Bundestag Defence Committee, and the universities of the Bundeswehr will influence the shaping of the Bundeswehr policies. The third element refers to the Bundeswehr specialised units at a Federal and Land Levels that deal with activities like investigations, relationship building and diplomacy, and peacekeeping missions. The last element is the civilian influence, which does not only come from the IF, but, as the same author addresses, from the civilian groups like youth organisations, churches and trade unions, all of which take part in the shaping of the Bundeswehr policies.<sup>531</sup>

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<sup>529</sup> H. Tewes, *Germany, Civilian Power and the New Europe: Enlarging Nato and the European Union* (Palgrave, New York 2002) 33

<sup>530</sup> CS Maier, “The Making of Pax Americana: Formative Moments of United States Ascendancy”, R. Ahmann, *et al* eds., *The Quest for Stability: Problems of West European Security 1918-1957* (Oxford 1993) 422

<sup>531</sup> T Dyson, *The Politics of German Defence and Security: Policy Leadership and Military Reform in the Post-Cold War Era* (Berghahn Books, New York 2007) 19-20

Post-WWII political forces created an army which would work hand in hand with civilians and would submit itself to a process of accountability upon civilian institutions, apart from incorporating a new ideology in military culture known as the “citizen in uniform”.<sup>532</sup> This concept provides the soldier with an inherent right to dignity and freedom of conscience, which will be explained later in this chapter. As Berger has established, post-WWII German militarism has been developed in “the culture of antimilitarism”<sup>533</sup>, whose main goal is to distance the armed forces from the actions of the past (especially the Nazi regime). Precisely, the new military culture is based on the foundation of a positive relationship between the military and society, and where the concept of “the citizen in uniform” is rooted, as German society did not want to experience another dictatorial State who could have complete control of the armed forces.

As explained above, the new German State and military culture directly detached themselves from the Nazi experience, as even local constitutional frameworks like the Constitution of the Free Hanse City of Bremen established that “dignity” had been disregarded by the National Socialists.<sup>534</sup> But how does the German state defined the concept of *dignity*? As Bendor and Sachs establish, we need to refer to the “object-formula”,<sup>535</sup> where one needs to identify if a person has been treated as an object in order to establish that his dignity has been violated, although this is not enough, as the authors establish that there are different elements that encompass this concept.<sup>536</sup> By its part, Enders establishes that the concept of human dignity cannot be explained from a textual approach, although it emanates from the constitutional concept that “all law has to emanate from the individual’s status as a legal subject”.<sup>537</sup> Human dignity has also been addressed by

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<sup>532</sup> G Nolte, H Krieger, *Military Law in Germany* (G. Nolte ed., W de G Recht 2006) 340

<sup>533</sup> K Longhurst, “Why Aren’t the Germans Debating the Draft? Path Dependency and the Persistence of Conscription” (2003) vol 12 no 2, *German Politics* 147, 165

<sup>534</sup> Constitution of the Free Hanse City of Bremen (1947) GER

<sup>535</sup> G Düring, *Grundgesetz-Kommentar* (1953) art 1, note 28

<sup>536</sup> AL Bendor, M Sachs, “The Constitutional Status of Human Dignity in Germany and Israel” (2011) 44 *Israel Law Review* 25, 61

<sup>537</sup> C Enders, “The Right to have Rights: The concept of human dignity in German Basic Law” (2010) 2 *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* 1, 8

Ebert and Oduor as a way to guarantee freedom and to empower citizens to debate key issues.<sup>538</sup>

For this reasons, human dignity is a central piece of German contemporary militarism, as it confers them freedom at any points to take decisions based on their own judgement in certain situations. Plus, it protects them of being used as instruments for the commitment of orders that are contrary to the spirit of the German Basic Law.

#### **4.1.1 The constitutional provisions of the German military**

In order to explain the context of these provisions, it is important to analyse the current German constitution to establish the foundation of its armed forces. At a constitutional level the base for the existence of the armed forces is founded in article 87a(1) of the German Basic Law,<sup>539</sup> which also references article 91 –the foundation for a state of emergency, or as the Basic Law states, an “internal emergency”-. Therefore, it is important to point that the commander of the armed forces is given to the figure of the Federal Minister of Defence, which has a civilian nature.<sup>540</sup>

Perhaps what illustrates in a broader way the high level of civilian control over the armed forces is article 115a. Such article addresses the need for the Bundestag to determine if the German territory is under attack, and only with the consent of the Bundesrat, which is the other part of the legislative power, a decision will be taken (by at least two thirds of the votes). If the situation does not allow this measure to be taken the decision will be in charge of the Joint Committee, which consists of both members of the Bundestag and the Bundesrat, with the first one providing two thirds of the total and the second one a third of the members. The Joint Committee will be in charge of taking decisions when a state of emergency is declared if the Bundestag cannot be assembled with enough time. Article 53(2) of the German Basic Law establishes that it is compulsory for the federal government to inform the Joint Committee if there is a plan on issuing a state of defence.<sup>541</sup>

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<sup>538</sup> R Ebert, R M J Oduor, “The Concept of Human Dignity in German and Kenyan Constitutional Law” (2012) 4 *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)* 43, 70

<sup>539</sup> Article 87a(1).- “The Federation shall establish Armed Forces for purposes of defence. Their numerical strength and general organisational structure must be shown in the budget.”

<sup>540</sup> Basic Law (n 312) art 65a(1)

<sup>541</sup> *ibid*

Another basic point in article 115a states that if the German territory is being attacked by an armed force, the Federal President will issue a declaration which shall be consistent with the principles of international law regarding states of emergency, and only with the consent of the Bundestag, with the Joint Committee also authorized to take such decision in place of the Bundestag if the situation requires it.

#### **4.1.2 German civil-military relations and the role of the State**

To introduce the theme of civil-military relations, it should be addressed that all the provisions in the German Basic Law will apply to civilians and soldiers as equal, as this is a consequence of the “citizen in uniform” spirit. A strong civilian control over the military can be inferred from the sovereignty of the people, which is another basic principle of the free democratic order, as such phrase emanates from article 20 of the German Basic Law, which establishes that “all state authority is derived from the people”.<sup>542</sup> This can be interpreted as the power that the citizens have to elect their representatives and grant them with State authority.

Another basic point for the armed personnel to obey is the separation of powers, which means that the civilian executive does not have the ability to command the armed forces by himself or to take a decision upon them, as this attribute is only granted to the Bundestag or to the Joint Committee;<sup>543</sup> it can also be interpreted as the inability of the military commanders to make decisions which might affect the democratic order. The principle of the responsibility that the executive and his ministers have with the parliament is related to the separation of powers, as the first one is always forced to report back all its actions to the parliament. This also affects military personnel due to the fact that the Minister of Defence is a civilian member (part of the executive government), so it constitutes the channel in which the military’s actions can be discussed and reported to the legislative. This is developed to be congruent with the lawfulness of the administration which the democratic legal order also points out.

As this order also establishes the independence of courts as one of its focal points, it can be stated that separation of powers is probably the most important axiological legal principle in which the modern German State bases itself. According to the *Innere Führung*, the independence of the courts also forms part of the

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<sup>542</sup> *ibid* art 20 (2)

<sup>543</sup> *ibid* art 115a(2)

principles which are of extreme importance to the military personnel.<sup>544</sup> The military's respect to the independence of courts is essential to provide society (the army included, as they have the same status as a citizen) with effective legal remedies and to guarantee efficient access to justice. Judicial independence also guarantees a strong civilian control over the armed forces, as the citizens can have prompt and transparent investigations in case that their rights are violated by military personnel.

The leading position in the defence of the German territory belongs to the Minister of Defence; the constitutional base for this position is contained in article 65a of the German Basic Law. Nolte and Krieger explain that the main aims of this position is to ensure that there will be a political position which will be accountable upon the Parliament, besides providing a strong civilian control over the actions of the armed forces.<sup>545</sup> Article 65a of the Basic Law is the foundation of the command that the Minister of Defence has over the armed forces;<sup>546</sup> this includes taking all the decisions that concern the aspects of such institution during peacetime and also during a state of tension.<sup>547</sup> As it has been explained before, during a state of defence this power will be transferred to the Federal Chancellor, and such state of defence will be determined by the Bundestag with the approval of the Bundesrat.

In the German established order the government does not have the power to lead the armed forces; article 65 of the German Basic Law addresses the power to determine policy guidelines and its limits. Article 65a especially states that the command of the military is appointed to the Federal Minister of Defence while peacetime, and article 115b establishes a special prerogative to the Federal Chancellor to take over the command of the armed forces if a state of emergency is declared. The federal government has a very limited degree of decision-taking regarding the military; this is contained in article 80, which gives a limited degree of power to the executive to issue statutory instruments whose contents shall be firmly grounded and stated in the law and should also have the approval of the Bundesrat.

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<sup>544</sup> Innere Führung (Leadership Development and Civic Education) 2008 (GER) [201]

<sup>545</sup> G. Nolte, H. Krieger (n 532) 364

<sup>546</sup> Article 65a (1). - "Command of the Armed Forces shall be vested in the Federal Minister of Defence."

<sup>547</sup> "Command of the Armed Forces" (*Federal Ministry of Defence*)  
<[http://www.bmvg.de/portal/a/bmvg/!ut/p/c4/04\\_SB8K8xLLM9MSSzPy8xBz9CP3I5EyrpHK9pNyydL3czLzM4pLUoszSXL2U1KJ4GF8vJTM1PrE0LT0xKVW\\_INtREQD0fMQo/](http://www.bmvg.de/portal/a/bmvg/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP3I5EyrpHK9pNyydL3czLzM4pLUoszSXL2U1KJ4GF8vJTM1PrE0LT0xKVW_INtREQD0fMQo/)> accessed 06 July 2014

Article 80a establishes an important principle: when a law that regards the general protection and defence of society is issued, it shall be approved only after the Bundestag has come to the conclusion that a “state of tension”<sup>548</sup> exists. Only a state of emergency can exclude the previous approval of the legislative.

The spirit of article 80 of the German Basic Law is aimed at limiting the type of power that the executive can directly apply to the military, which gets reduced to mere administrative matters, not including issues that would cause a change in the duties of military personnel. According to Frevert, after Germany signed the Bonn-Paris conventions (which put an end to the Allied provisional government in West Germany) in 1954, “the civil power of the parliamentary armed forces” was established. This principle prevented the lack of civilian control of the Weimar Republic, when presidents and military high-ranking officers could establish military aims without needing consent from the parliament.<sup>549</sup> These principles are part of the post-WWII demilitarisation of the German State.

Article 115a of the German Basic Law decides especially the concept of “State of Defence” in which the German Parliament has a fundamental role on the case of an armed deployment. The Government needs to determine that the German territory is being attacked by armed forces or that an imminent armed threat to the civilian safety exists. After this determination the government submits an application which will require two-thirds of the votes, alongside with a majority of the votes from the members of the Bundestag (with the approval of the Bundesrat). The Joint Committee will make this determination if the situation requires a fast response, or if the nature of the attack prevents the Parliament from discussing the matter.<sup>550</sup> The importance given to the discussion and multiple agreements between different civilian actors before taking a decision as transcendental as a military deployment should be noted. Even in a situation of extreme urgency such decision must be taken between different members of either the legislative force or the executive government, but never a unilateral decision. The constitutional base over the German armed forces is found in article 45a (1) and (2), which states that the Bundestag will appoint a Defence Committee whose main attribute will be to enquire

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<sup>548</sup> Basic Law (n 312) art 80a(1)

<sup>549</sup> U. Frevert, *A Nation in Barracks: Modern Germany, Military Conscription and Civil Society* (A. Boreham, D. Brückenhaus trs, Berg, Oxford, New York 2004) 263

<sup>550</sup> Basic Law (n 312) art 115a [2]

members of the armed forces. By its part, article 45b establishes a commissioner dedicated to the surveillance of the military.

#### 4.1.3 The *Innere Führung* and the “citizen in uniform” model

The *Innere Führung* is a regulation that is considered fundamental for service in the Bundeswehr. Its preface states to contain “fundamental statements on the self-image of soldiers in a democracy”.<sup>551</sup> P. McGregor has stated that the principal role of the *IF* is to “shape military efficient, democratically controlled and socially integrated armed forces”.<sup>552</sup> This framework also aims to establish a rupture with the military culture of Nazi Germany and states that the soldiers need to understand tradition and evaluate current political events as part of facing Germany’s past.<sup>553</sup> The Federal Ministry of Defence has explained the principles of the *IF* stating “that the members of the armed forces are citizens who must be integrated into our society, that the basic rights of citizens are guaranteed, and that the rule of law must be applied.”<sup>554</sup> The same document establishes that the soldiers must require the classic military skills but there must also be an emphasis on other abilities such as the support for personal freedom, personal dignity and human rights, as well as the mediation between parties to resolve conflict before using violence.<sup>555</sup>

The *IF* has been developed as a medium for the commanders and officers to guide their actions, but it is also used as a model of behaviour in military schools. Its structure is not dogmatic though, as it is continually being developed and reformed in order to adapt to the current geopolitical conditions. This code states the principles that soldiers must defend are freedom, human dignity, equality, justice, peace, democracy and solidarity.<sup>556</sup> At a legal level international law, the German Basic Law and military legislation are on top of the *IF*.<sup>557</sup> An essential point is that

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<sup>551</sup> *Innere Führung* (n 544) [2]

<sup>552</sup> P. McGregor, “The Role of *Innere Führung* in German Civil-Military Relations” (*Center for Contemporary Conflict, DTIC Online* 2006) <handle.dtic.mil/100.2/ADA52098> accessed 27 June 2014

<sup>553</sup> *Innere Führung* (n 544) [5]

<sup>554</sup> Bundeswehr, *The Bundeswehr in 2002: The Current Situation and Perspectives* (The Federal Ministry of Defence, Bonn 2002) 53

<sup>555</sup> *ibid*

<sup>556</sup> *Innere Führung* (n 544) [106]

<sup>557</sup> *ibid* [306]



this code also establishes that military personnel have the same status as the citizens, as it is explicitly stated that “the fundamental rights of the German constitution apply to Bundeswehr personnel”.<sup>558</sup> There will be certain rights which are subjected to restrictions part of the military legislation, but the fundamental rights established in the Basic Law will be the same for everyone.

The WWII events, in which thousands of military personnel, not only soldiers, but also nurses, doctors, etc., were forced to perform acts which went against their own personal values were taken into consideration at the moment of creating the “citizen in uniform” model, which is considered by the *IF* as the main element of the code’s concept,<sup>559</sup> and will be the foundation for the conduct of the soldiers. The principles in which the “citizen in uniform” concept is referred are established more directly are established across the code; these include: mission command and shared responsibility,<sup>560</sup> the soldier’s participation in organising activities,<sup>561</sup> the political awareness,<sup>562</sup> and their participation in decision-taking.<sup>563</sup> The soldier’s politicisation is what the code’s preface inferred when it established that this process helps the soldier to face the past and understand tradition; this politicisation is what Janowitz established when he stated that the armed forces were becoming constabularies that “provide continuity with past military experiences and traditions, but it also offers a basis for the radical adaptation of the profession”.<sup>564</sup>

Van Doorn establishes that the main ideology behind the “citizen in uniform” concept is that it marks a clear difference with the military professional, as this last one has developed an expertise on the subject and serves society as a specialist in the military, whereas the citizen in uniform is an active member of society and is involved in its political aspects. He has been granted a right to possess weapons, so he uses this special power as a way of serving society. Van Doorn also defines that “the way in which armed forces are related to society is defined and controlled by

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<sup>558</sup> *ibid* [308]

<sup>559</sup> *ibid* [301]

<sup>560</sup> *ibid* [613]

<sup>561</sup> *ibid* [618]

<sup>562</sup> *ibid* [627]

<sup>563</sup> *ibid* [640]

<sup>564</sup> M. Janowitz (n 397) 418

the societal environment”.<sup>565</sup> This definition explains in a clear way how are the armed forces viewed in Germany: as servants to the community who are given special attributions but are still part of the same community; therefore, they should be subjected to the same rule of law as any other citizen.

#### **4.1.4 The rights of the soldiers in Germany**

The Basic Law makes explicit remarks about the fundamental rights of the military personnel in its article 17(1), which states that certain military and alternative service rights can be restricted while performing their duties. While this legal provision is restrictive, a much more liberal prerogative is established on the German Law on the Rights and Duties of Soldiers (SG or *Soldatengesetz*) which establishes that, although their rights are limited by the requirements of their military obligations, the soldiers have the same civil rights as any citizen<sup>566</sup>, taking direct inspiration from the *Innere Führung* and its “citizen in uniform” concept. Point (4) of the SG states that superiors may only issue commands that involve official (military) purposes, and such orders must always be subjected to the rules of international and domestic laws and regulations.<sup>567</sup> Section 2.8 establishes that the soldier needs to recognise the free democratic order in the way that the constitution establishes it, and protect its existence through his duties.<sup>568</sup> The advantage of the military recognising this order relies on the fact that they have been given the same rights of any citizen, so, by legitimising the principles in which contemporary German State is built upon, they are also legitimising their entitlement to all rights. Also, the military limits of actively becoming a member of the political class are also stated in the *Soldatengesetz*. The members of the armed forces can run for political office but they have to leave the armed forces before.<sup>569</sup> This is a way to prevent a conflict of interests between the army and the civil state.

A common justification from the soldiers (not only in Mexico, which is the main focus of this research, but also in other societies) who have been indicated as responsible for human rights violations, consists in stating that “they were only following orders”. A concept of modern German militarism is related to both the

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<sup>565</sup> P McGregor (n 552) citing Van Doorn

<sup>566</sup> Civic Rights of the Soldier, Law on the Rights and Duties of Soldiers 2014 (GER) (Civic Rights of the Soldier) sect 6

<sup>567</sup> *ibid* sect 6 [4]

<sup>568</sup> *ibid* sect 2[8]

<sup>569</sup> *Ibid* sect 2[25]

power to command and the duty to obey. The SG states in its section 10(4) that there will be certain limitations to the powers of the commanders and their orders. It states that these powers must have a military purpose, must be performed under the rule of law, and must be congruent with public international law standards. The concept of the *duty to obey* is established in section 11(1) of the same code, as this states that the soldier has to follow his commander's orders unless he is committing a crime, which he will be guilty of only if he knows it was a crime or if the circumstances made it obvious.<sup>570</sup> This principle resides in the fact that military personnel must comply with the orders from their superiors without delay and giving their best effort.

An aspect which is related to the concept of the "citizen in uniform" and that is important to analyse in this part, is that such section also states that a soldier has the freedom to disobey an order if it violates human dignity or if such order is not part of an official plan. If the soldier executes an order which contradicts the former assumptions, they will only be freed of any charges if they can prove that such command could not be avoided, or that its consequences were not expected for the performer.<sup>571</sup> The Basic Law establishes the faculty of a person to be compelled against the use of arms in military service, as this is a consequence of the freedom of conscience which is inviolable.<sup>572</sup> In this regard, the German Federal Administrative Court established that the meaning of complying with an order *conscientiously* means that the soldier must comply in a "conscious" way, establishing that "a soldier insofar has to act with all the diligence and responsibility possible to him and has to act accordingly".<sup>573</sup> Therefore, an unlawful order and the duty to obey unconditionally is not possible, as it would contradict the *conscientiously* compliance of the military.

#### **4.1.5 How do the German military personnel file a complaint?**

Which are the procedures for the modern soldier to file a complaint or express his dissatisfaction? A system of filing complaints was developed: even

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<sup>570</sup> Civic Rights of the Soldier (n 566) sect 2[11]

<sup>571</sup> Ibid [1]

<sup>572</sup> Basic Law (n 312) art 4[1][2]

<sup>573</sup> International Committee of the Red Cross (ICRC), *Germany - Practice Relating to Rule 154. Obedience to Superior Orders*, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_de\\_rule154](https://www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule154), accessed 20 June 2016.

though such system is far from perfect and has been critiqued by academics,<sup>574</sup> it has proved to be one of the most democratic military institutions in the West.

Nolte and Krieger explain the different methods of filing such complaints: a) Formal complaints: article 19(4) of the German Basic Law is the constitutional foundation for any citizen to have access to any types of courts depending on their jurisdiction, or if such is not the case, to their ordinary courts;<sup>575</sup> since the German military are considered no different than the common citizen, this constitutional regulation will also apply to them.

The secondary law which has been developed to guarantee the legal protection for the complaints and wellbeing of the soldiers is the German Military Complaints Regulations (WBO). The WBO states that the military has "...the rights to lodge a complaint if they believe that they have been treated wrongly by superiors or by Bundeswehr agencies or have been harmed as a result of breach of duty by fellow soldiers."<sup>576</sup> This implies that they have the right to lodge a complaint not only against a person in particular, but also against the Federal Defence institutions themselves, which might involve administrative issues apart from human rights violations. Another very important feature that is a part of the "citizen in uniform" spirit is the prohibition from reprehending or taking any kind of actions that might put personnel in disadvantaged for having lodged a complaint without the proper fundament.<sup>577</sup>

Nolte and Krieger establish that this section aims to protect a soldier from a possible intimidation from a superior, and also represents the separation of powers, as this right was introduced by an act of parliament rather than a governmental ordinance.<sup>578</sup> The benefits of the WBO are numerous, as it grants the military personnel a sense of security and dignifies their complaints without having the fear of facing any backlash. The formal complaints might also be channelled through the *Vertrauensperson*, who is the spokesman that represents the military.

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<sup>574</sup> G. Nolte, H. Krieger (n 532) 391

<sup>575</sup> Basic Law (n 312) art 19[4]

<sup>576</sup> German Military Complaints Regulations 2009 (GER) (German Complaints Regulation) sect 1

<sup>577</sup> *ibid* sect 2

<sup>578</sup> G. Nolte, H. Krieger (n 532) 391

There are two types of complaints which can be processed: the disciplinary affairs complaint (*Disziplinarbeschwerde*) will take care of the issues arising between different ranks; an example of such complaint can be a soldier's challenging of an order from a superior officer.<sup>579</sup> The Guidelines for Determination of the Disciplinary Measure are stated in Section 38 of the Military Discipline Code (WDO), which establishes that different characteristics of the disciplinary offence will be taken into account. When such offense is not considered serious they will meet mild disciplinary measures; but more severe measures, including disciplinary arrest, can be imposed if other ones, such as disciplinary and educational measures, fail.<sup>580</sup> According to Nolte and Krieger, the complaints in administrative matters will involve issues that arise in the relation between a commander and a subordinate, this last one having the position of an employee.<sup>581</sup> The WBO states in its section 23(1) that preliminary proceedings will take place if recourse for legal action is available in the administrative courts, and the complaint has a relation with a service status.<sup>582</sup> As it can be seen, the difference between administrative matters and issues concerning orders and relationship between the personnel has been well defined and established in order to channel formal complaints through a clear and understandable path.

The military personnel also have three defined paths to make a petition: the right to an informal complaint (a figure called *Dienstaufsichtsbeschwerde*); the right to a parliamentary petition; and the right to make a petition to the military Ombudsman.<sup>583</sup> The constitutional foundation for the right to make a petition is found in article 17 of the German Basic Law, but there are some defined limits for the military in service to this right. The WBO establishes in its Section 1(4), that joint complaints are not admitted for military personnel<sup>584</sup> -making this a clear difference between the rest of society-, and entering in conflict with the "citizen in uniform" spirit. As Nolte and Krieger note though, most authors state that such collective right must be allowed, since a parliamentary petition does not carry the same risk as

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<sup>579</sup> *ibid* 393

<sup>580</sup> German Disciplinary Code 2008 (GER) sect 38[1]-[3]

<sup>581</sup> G. Nolte, H. Krieger (n 532) 393

<sup>582</sup> German Complaints Regulation (n 576) sect 23[1]

<sup>583</sup> G. Nolte, H. Krieger (n 532) 394

<sup>584</sup> German Complaints Regulation (n 576) sect 1[4]

making a complaint directly to a commander.<sup>585</sup> The allowance of military joint petitions and complaints would indeed give protection to the basic personnel from the higher ranks, and can be considered as an adequate system to prevent unilateral controls inside the barracks. Nolte and Krieger also note that the *informal* complaint is congruent if we take into account that there are established requirements to submit a formal one, but a soldier might have a complaint that might not be met in a certain context.<sup>586</sup> Again, the German Basic Law provides the path for lodging these informal complaints for the military, as its article 17 only restricts them from exercising certain rights but does not impose a restriction from lodging any form of petition.

Another path which the military has for lodging a complaint is the petition to the Ombudsman (which works as another form of parliamentary petition as the a figure which is currently denominated as Parliamentary Commissioner for the Armed Forces), is established in article 45(b) of the German Basic Law. This commissioner does not only monitor the armed forces' actions, but also works on safeguarding their basic rights. Information on this figure is provided by the Bundestag, who states the following: "When acting on instructions from the Bundestag or the Defence Committee to investigate a specific matter, and dealing with petitions in which the petitioner expresses a specific grievance, the Parliamentary Commissioner has the right to hear the petitioner as well as experts and witnesses in person".<sup>587</sup> Finally, the last remedy that the military personnel has to lodge a complaint is the right to propose the change of an order to a superior, if the soldier thinks that such order might be illegal or inappropriate.<sup>588</sup>

#### **4.1.6 How do civilians file a complaint against the armed forces?**

Finally, the process that civilians have to put a complaint against the armed forces is also governed by the principle of the "citizen in uniform", as, since the end of WWII, Germany has no military courts. The process for filing complaints against military personnel is done in the same way as the filing of complaints any other member of society; this implies contacting the local police station, as the German enforcement system is divided in states. In the case that a member of the armed

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<sup>585</sup> G. Nolte, H. Krieger (n 532) 394

<sup>586</sup> *ibid* 394

<sup>587</sup> "The Parliamentary Commissioner for the Armed Forces" (Deutscher Bundestag, Berlin 2014) 23

<sup>588</sup> G. Nolte, H. Krieger (n 532) 395

forces commits a crime that is only prosecuted upon request, the superior under which the military that committed a crime was serving to will file the request.<sup>589</sup> In any other case, if the armed forces commit a crime against a civilian, whether they are on or off duty-, the civilian investigators will take the complaints and the civilian criminal court will handle the trial.

#### **4.1.7 The importance of a military ombudsman in the German contemporary system**

Why is a military ombudsman needed? The Geneva Centre of the Democratic Control of the Armed Forces (DCAF) states that there is a need for the strengthening of civilian and democratic controls over the military; secondly, the rights of the soldiers are more protected if systems for handling complaints are established; thirdly, the factor of independence is essential, as a specialised mechanism to monitor practices, procedures and policies inside the armed forces is necessary.<sup>590</sup> Also, public trust in the military increases as their administrative processes become transparent; also, the ombudsman helps shaping civilian democratic controls, as it strengthens the rule of law, human rights within the army, and good governance.<sup>591</sup> As it can be seen, the figure of a military ombudsman is fundamental in the shaping and improvement of civil-military relations, as it helps strengthening civilian controls and improves transparency inside the armed forces, at the same time that military personnel are able to protect their human rights in a more direct way, as there is a figure who acts as their representative upon the State.

The DCAF establishes six points that describe the relevance of such institution: being able to control the defence sector with democratic values, monitoring the respect to law inside the armed forces, providing surveillance on accountability and transparency, helping to get attention on strictly military issues, improving the effectiveness and response of the defence sector, and creating a stronger bond between civilians and military personnel.<sup>592</sup> Basically, the figure of the ombudsman is of a supervisor which can monitor the activities of the armed forces

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<sup>589</sup> German Criminal Code (1998) (GER) section 77a[1]

<sup>590</sup> S. Buckland, W. McDermott, *Ombuds Institutions for the Armed Forces: A Handbook* (DCAF, Geneva 2012) 13

<sup>591</sup> H Born, I Leigh, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (DCAF, Geneva 2008) 230

<sup>592</sup> "Backgrounder – Security Sector Governance and Reform, *Military Ombudsman*" (Geneva Centre for the Democratic Control of Armed Forces 2006) (Background) 1

and can settle issues and disputes, both concerning events that take place in the military sphere, but also when problems arise between the military and the civilians.

A set of attributions have been established for the Military Ombudsman in order to meet the required criteria to supervise the defence sector. These are: autonomy to investigate and initiate investigations; having the necessary protection to operate discretionally; receiving the funds to issue publications; granting the authority to issue recommendations that both military and civilian officers should consider, and asking for responses from them; having its own premises; and at a constitutional level, their attributions and limits need to be clearly defined.<sup>593</sup> Having said that, the discussion of the Military Ombudsman in Germany, also known as *Wehrbeauftragter des Bundestages* (WB), is substantially important to have a point of comparison, as this institution was radically transformed over the second half of the XX century and it is highly regarded as an example of democracy and progressiveness in the protection of human rights. The figure of the Military Ombudsman will be discussed in detail in the following section.

#### **4.1.8 The Parliamentary Commissioner for the Armed Forces**

This figure consists of a representative inside the Bundestag (which is the legislative organ established in 1949, after the fall of the Reichstag), he is elected through a secret ballot process by the members of parliament for a five-year term. According to the description from the Bundestag, the Commissioner is not a civil servant but neither is he a member of the parliament. The German law grants him a special power where he works in consultancy matters in both the parliament and the military personnel, assisting the rights of these last ones while monitoring them to present reports to Parliament regarding the conditions and activities within the armed forces.<sup>594</sup>

Regarding human rights matters, the Bundestag indicates that most of the time the Commissioner initiates investigations and consultancy on his own will. Such investigations include events in which the rights of military personnel, such as freedom of speech, legal protection, or human dignity, have been violated. Accessing to such information through news reports, visits to the military headquarters, petitions from military personnel and information from the members of

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<sup>593</sup> *ibid* 1-2

<sup>594</sup> "The Parliamentary Commissioner for the Armed Forces" (*Deutscher Bundestag* 28 May 2014) [http://www.bundestag.de/htdocs\\_e/bundestag/commissioner/](http://www.bundestag.de/htdocs_e/bundestag/commissioner/), accessed 28 May 2014



Parliament is also included among the investigations.<sup>595</sup> There are strong mechanisms to prevent behaviour which might be considered suspicious from both the public and other institutions, not only in legal terms but even in symbolic regulations -such as the fact that the Commissioner does not sit alongside the legislators from the Bundestag, and neither does he sit in the government bench-.<sup>596</sup> This gesture shows the advanced level of thought that this institution has put in order to avoid accusations of corruption or bias.

The civilian nature of the Commissioner also has the benefit of being able to establish direct paths of communication with the military personnel. This means that if a member of the armed forces wants to contact him, such member does not need any type of approval or monitoring being done by his commanders.<sup>597</sup> Such attribution represents a double benefit for both civilians and military personnel, as the Commissioner is neither put under political pressure from the executive, the Bundestag or the commanders in the army in the case that an issue between both spheres arises. The Commissioner has a high workload, as the situations that he needs to respond to are not only those which concern human rights abuses, but his supervision should cover all the aspects that come with militarism, being of administrative, social, and –in some cases-, personal issues.<sup>598</sup>

The secondary law -which is the foundation for the Commissioners attributions-, is the Act on the Parliamentary Commissioner for the Armed Forces, which is also divided in sections. The functions of this figure can be summarised in: reporting his duties to Parliament and the Defence Committee (he is also entitled to submit individual reports when requested), monitoring and starting investigations - apart from taking actions when at his or her discretion, a violation of the human rights from any military personnel, or when the principles of the *Innere Führung* have been violated-.<sup>599</sup> His official powers are enclosed in section 3, which include the ability to demand records and files from the Federal Minister of Defence and his subordinates, visit the agencies and headquarters of the Federal Armed Forces, elaborate reports on how military discipline is being exercised, and the ability to

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<sup>595</sup> *ibid*

<sup>596</sup> *ibid*

<sup>597</sup> *ibid*

<sup>598</sup> Deutscher Bundestag (n 587)

<sup>599</sup> Act on the Parliamentary Commissioner for the Armed Forces 2014 (GER) sects [1], [2]

attend court proceedings even if the subject matter makes it necessary to exclude the public from it.<sup>600</sup> Sections 7 and 9 refer to the faculty of military personnel to file complaints to the ombudsman without any superior revising any details of the complaint submitted. Such legal provision states that the members of the armed forces have the right to lodge complaints or contact the Commissioner without having to make their superiors aware of such complaint. As it has been stated previously, the complainant shall not be discriminated or intimidated in any form, as the Commissioner is entitled to keep this complaint confidentially if the petitioner asks for it.

Section 10 goes deeper into the principle of confidentiality, as it requires the Commissioner to maintain secrecy towards all the issues that he might have knowledge of when his term of office ends; this includes not revealing or handling any evidence without permission. The main goal of this provision is to protect everyone that is involved in a complaint from repercussions or consequences for lodging complaints. The only point which allows the commissioner to report evidence is when the free democratic order is considered to be endangered;<sup>601</sup> this last point is based upon the conception that the German State developed in the second half of the XX century, considering the free democratic basic order as a collective right of German society as a whole, which shall be a priority on top of any personal interests or issues.

#### **4.1.9 Final considerations about the German civil-military relations**

Even though the whole German State practically collapsed after the end of WWII, the political will of everyone involved in its restructuring made it possible to develop a complete transformation of the legal attributions of the military, the power of the executive and the military commanders over the armed bodies, and the development of the “citizen in uniform” concept. While the Basic Law itself provides a high level of protection to German society as a whole from an authoritarian decision (such as a unilateral declaration of a State of Emergency), the parliament is also given enough power to take similar decisions, while ensuring that a majority is in favour of such measure.

The parliamentary commissioner serves two roles at the same time; at the same time that he represents the interests of military personnel, he also supervises

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<sup>600</sup> *ibid* sect 3

<sup>601</sup> Act on the Parliamentary Commissioner for the Armed Forces (n 599) sects 7, 9, 10

them and is accountable towards the parliament for reporting every matter regarding the armed forces. This is beneficial for both society and the military, as the wellbeing of both sides is being protected. Once again, this is made possible by granting the soldiers the same rights and obligations as the civilians. If there was less transparency of every matter that goes inside the barracks, the process of both submitting the personnel accountability, and also protecting their rights, would be more complicated. Because the soldiers have different paths to submit their complaints, these prevent the personnel from feeling isolated from society and relieve tensions between civilians and the army.

#### **4.2 In introduction to Mexico's military issues: desertion and wage inequality**

The German and the Mexican military institutions are being compared in this thesis not only in terms of accountability, but also to compare the mechanisms of complaints for the own military personnel. To point one example of the current issues among the Mexican armed personnel themselves (apart from the crisis of current civil-military relations), it is relevant to address the fact that reports issued during Felipe Calderon's administration state that more than 55,000 members of the armed forces deserted.<sup>602</sup> These reports also state that during the Administration of Vicente Fox (2000-2006) the number was even higher (107,000 desertions). Guevara Moyano establishes that among the principal factors that influence armed personnel to desert are the lack of adaptation that militarism requires, and the poor wages that they receive.<sup>603</sup> At the start of 2006, when the indefinite deployment of the army was established, the lowest-ranked soldiers only received 3,865.25 Mexican Pesos per month (which equals approximately 180 British Pounds). This wage was gradually raised over Calderon's administration, and in 2013 the monthly wage for base personnel per month was of 15,789 Mexican Pesos -which equals around 650 British Pounds-. While this is definitely a palpable increase, the contrast with the economic perceptions of the highest commanders is notable: in 2013, a Division Commander or a Navy Admiral received the total of 222,450 Mexican Pesos per month (9,000 British Pounds).<sup>604</sup> Such disproportion shows the level of inequality between ranks, which is just one of many concerns that analysts establish

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<sup>602</sup> Z. Camacho, "More than 55 thousand desertions in the Armed Forces" *Contralínea* (Mexico City 9 June 2013) <<http://contralinea.info/archivo-revista/index.php/2013/06/09/mas-de-55-mil-deserciones-en-las-fuerzas-armadas/>> accessed 28 May 2014

<sup>603</sup> *ibid*

<sup>604</sup> *ibid*

when explaining the lack of satisfaction inside the armed forces. A deep study of the events which have led to such high rates of personnel desert has not been developed, but this economic factor is difficult to ignore. Although the economic aspect of the soldiers' wellbeing might seem out of place in this discussion, such an issue cannot be ignored when understanding the deep root of the lack of democratic development inside the military barracks.

#### **4.2.1 The (insufficient) development of the Mexican Military during the XX century**

The Mexican armed forces did not have a central role during WWII; the government collaborated with the allies (especially with the United States), sending the aeronautic special body to the US in July of 1944 (this group would later receive the name is Expeditionary Aerial Force in 1945, and it was best known as Squadron 201). In order to have a decently organised army, regional civilian committees - which were formed by persons coming from different backgrounds (public institutions, social organisations)-, were under the orders of military authorities designated by the National Defence Secretary.<sup>605</sup> After the 1950s, the Mexican State established reforms and created the Officer Formative Schools of Specialities and Application; Superior Schools; and Postgrad Schools.<sup>606</sup> Certainly, institutional reforms were made, although these never gave civil-military relations the importance that Germany gave them after WWII.

The most important reform concerning accountability for the Mexican army has been the Military Justice Code reform of 2014, which has been addressed in the second chapter, but this has not been determinant in the evolution an strengthening of civil-military relations. The deployment of the army based only in constitutional article 89-VI and without the consent of the legislative is one of the prime examples of the undemocratic control the executive currently has over the armed forces. The number of institutions created in the second half of the XX century did help professionalising the military carers, but the army's undemocratic relations with the political class prevented the State from establishing civilian controls and figures like a military ombudsman. The analysis made in previous chapter showed issues like the concentration of power in military commanders, the lack of coordination between

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<sup>605</sup> "From the Second World War to our current days" (*National Defence Secretary*) <<http://www.sedena.gob.mx/conoce-la-sedena/antecedentes-historicos/ejercito-mexicano/de-la-segunda-guerra-mundial-a-nuestros-dias>> accessed 02 June 2014

<sup>606</sup> *ibid*

institutions, the lack of independence in courts, and the institutional fragility within the armed forces.

In this part of the chapter, the Mexican legal base for the deployment of the military, the soldiers' rights and ethics and the military courts are discussed, as this allows setting standards for the subsequent institutional comparison between with Germany in this research's study.

#### **4.2.2 The constitutional base for the deployment of the Armed Forces in Mexico**

One of the most important features that distinguish the Mexican from the German army is the powers of the executive and legislative powers regarding control over military. The strong civilian and parliamentary control that Germany has over its armed forces serves as a point of comparison with article 89 fraction VI of the Mexican Constitution, which, as it has been stated previously on this research, gives absolute power to the President to dispose all the Army, Aerial Force and the Navy for the interior and exterior defence of the federal republic. Although fraction VIII establishes that the Federal Congress must legislate for the President to make use of the armed forces, in the case of the deployment taken place in 2006 ex-president Felipe Calderón did not consult any legislative organ and instead issued a presidential decree on the Official Diary of the Federation, establishing the creation of a "special force body", which would aid the civilian security forces in the war against organised crime. This decree has not been removed or reformed by current president Enrique Peña Nieto.

The presidential decree which was issued on the 17<sup>th</sup> of September of 2007 gave attribution to the army for defence duties supporting the civilian security forces on the operatives against organised crime.<sup>607</sup> This presidential decree was only signed by ex-president Calderón; the Government Secretary, the National Defence Secretary and the Public Safety Secretary. Not a single representative of the legislative power was asked to sign the document. This represents the high level of subordination of the armed forces and the Federal Congress to the executive in Mexico, especially if we compare it to its German counterpart, as article 87a (3) of the German Basic Law establishes that the Bundestag or the Bundesrat have the power to stop the employment of the armed forces in the aiding of civilian force whenever they consider it. While a supporter of Calderón's strategy might state that

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<sup>607</sup> Official Diary of the Federation (n 281)

the presidential decree which made the deployment legal was signed by various members of the government, it should be mentioned that Guillermo Galvan Galvan was National Defence Secretary at that point and a military commander in functions at the same time. This situation is contradictory with the spirit of a strong civilian control over the military actions; it is also important to point out that such decree had been signed 10 months after the first indefinite deployment of the army in December of 2006.

To contrast with the strong German parliamentary control over the military,<sup>608</sup> the Internal Regulation of the National Defence Secretary in its article 10 fractions II explicitly establishes the involvement of the executive, as the National Defence Secretary is obliged to submit any issue regarding the Defence Secretary and its state modules across the country to the President. Besides, fractions IV and VI of the mentioned article state that the Secretary must perform the special functions and establish the commissions that the President confers to him and every legal initiative, legislative decree, regulation and agreement that concerns defence matters must be proposed to the President through the Juridical Council of the Federal Executive.<sup>609</sup> These provisions refer directly to the constitutional attribute which gives the Mexican president the supreme command of the armed forces, putting him above the Defence Secretary in the hierarchical scale.

#### **4.2.3 Human Rights institutions in the constitution of Mexico**

In the case of Mexico, the power of the federal congress to establish the Human Rights National Commission is established in article 102 fractions B, which grants autonomy to such institution for establishing its budget, management, juridical personality, and its own patrimony. Consequently, the Mexican commission has established its own management in the Internal Regulation of the Human Rights National Commission, but such regulation does not grant any powers to the ombudsman (who is called President of the National Commission of Human Rights), over the armed forces. In this legal framework he is entitled to send representatives called *visitors*,<sup>610</sup> which will be entitled to investigate and promote criminal investigations for human rights violations, but every attribution is strictly civilian.

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<sup>608</sup> Basic Law (n 312) Article 45b: "A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary oversight over the Armed Forces. Details shall be regulated by a federal law."

<sup>609</sup> Internal Regulation of the National Defence Secretary 2014 (MEX) art 10 [II], [IV], [VI]

<sup>610</sup> Internal Regulation of the Human Rights National Commission 2013 (MEX) art 63

That is the reason which has prevented the Human Rights Commission from accessing military files until now. This is also compared with the German Basic Law, whose article 45b creates the figure of the Parliamentary Commissioner of the Armed Forces in order to assist the Bundestag in monitoring the armed forces.

To make a direct comparison with the Mexican Federal Congress, the Senators Chamber has also established a National Defence Commission, which is established in a secondary law (The Organic Law of the United Mexican States General Congress), whose article 90 point VII state that national defence will be part of the ordinary committees. Another secondary law (The Republic Senate Regulation) establishes that the Senators will have the power to approve or ratify the designations that the President of the Republic does of various positions -which include Colonels and other superior commanders of the Aerial Force and the Army, also with their equivalent in the Navy-. It should be addressed that the Mexican Constitution states that the legislative power will not have the legal attributions of ratifying the designation that the President makes neither of the National Defence Secretary nor the Navy Secretary, which are the highest positions in the armed forces. This limits the legislative attributions over the armed forces in a considerable way, and that aspect, combined with the fact that the National Defence Secretary is a an active military commander himself, gives the President complete political control over the military, if we take into consideration that the Defence Minister position is given by the executive. These legal attributions are not up to date with the standards of civilian control that modern military institutions should meet.

#### **4.2.4 Ethics in the Mexican Army**

It can be established that the Mexican armed forces have a similar code of ethics that resembles the *Innere Führung* in some points, although it is much more undeveloped and does not establish a democratic relation between society and the armed forces. To explain the axiological principles which the military have to exercise in their daily actions, it should be addressed that the Military Code of Conduct refers article 113 of the Mexican Constitution, which states that public servants will obey the administrative laws in order to safeguard principles such as impartiality, loyalty, honesty, legality and efficiency in their respective tasks.<sup>611</sup> By its part, the Code of Conduct addresses its main goal in the last version that was published in the Official Diary of the Federation, which establishes the “general

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<sup>611</sup> Political Constitution of the United Mexican States 2015 (MEX) art 113

guidelines for the establishment of permanent actions which will ensure the integrity and ethical behaviour of public servants in the performance of their duties, positions or commissions".<sup>612</sup> This includes not only military personnel, but also any civilian who works for/with the State. The Mexican government's aim in the Code of Conduct was to give the armed forces personnel the same logic of service and sense of duty than any other public servant, this creates a contradiction which is materialized in the existence of different juridical spheres being applied to the military personnel and their civilian counterparts, as all the civil security officers are subjected to the civilian rule of law, but their military counterparts are subjected to the military jurisdiction, unless a citizen's human rights are violated.

The basic ethic principles for the Military Justice Code are also taken from the Code of Ethics of the Public Servants of the Federal Public Administration, which again, does not make a distinction between the civil and the military jurisdiction. The principles being referred are: the common wellbeing; honesty, impartiality, justice, transparency, accountability, cultural and ecological background, generosity, equality, respect, and leadership.<sup>613</sup> This code enlists a table of specific values which every military member must observe and then explains all of the concepts enlisted.

The main point of comparison in this topic between the Mexican Military Justice Code of Conduct and the German *Innere Führung* is the concept of the "citizen in uniform". For that matter, we must refer article IV point H of the Mexican Code of Conduct. The referred article in both its sub-points a and b does not imply that the soldier is a member of the community like its German counterpart, but instead establishes that the military personnel have the obligation of providing the citizens with "a fair, polite, and egalitarian treatment, with the aim of inspiring trust, credibility, and respect".<sup>614</sup> From reading this phrase, it can be stated that the Code of Conduct does not give the military personnel the character of a citizen, but of a military expert whose mission is to protect society, while at the same time giving

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<sup>612</sup> "General guidelines for the establishment of permanent actions that guarantee integrity and ethical behaviour of public servants in the performance of their jobs, positions or commission" *Official Diary of the Federation* (Mexico City 06 March 2012) <[http://www.dof.gob.mx/nota\\_detalle.php?codigo=5236535&fecha=06/03/2012](http://www.dof.gob.mx/nota_detalle.php?codigo=5236535&fecha=06/03/2012)> accessed 27 June 2014

<sup>613</sup> Military Justice Code of the Public Servants from the National Defence Secretary 2013 (MEX)

<sup>614</sup> *ibid* art IV, point A, sub-point a



them an “egalitarian” treatment, which is a contradiction as the code does not see its personnel in the same position as a citizen.

The second paragraph of sub-point b of point A of article IV establishes another situation which creates uncertainty and leaves the armed personnel without a clearly established mechanism of protection. The point in discussion states that the public servants of the National Defence Secretary must inform (in a written form) to their immediate superior about any procedure, resolution or statement of any issues in which the referred personnel might have a personal, familiar or business interest which would result in a benefit for him, his partner, blood-related, in-law or up to fourth grade of affinity relatives, or third parties which he might have professional, labour or business relations which could oppose to the interests of the National Defence Secretary.<sup>615</sup>

#### **4.2.5 The lack of a Military Ombudsman in Mexico**

The civilian system includes a national ombudsman which –as is the case in Mexico-, works on the issues from both civilian and military spheres. The Backgrounder - Security Sector Governance and Reform document on Military Ombudsman (elaborated by the DECAF), states that in order for this figure to develop a good accountability system, the institution needs to show that “it is truly independent, impartial, fair and effective in its recommendations”.<sup>616</sup> One of the main problems concerning the institutional defence of human rights in Mexico is that the national ombudsman has generated suspicion among diverse sectors for not showing independence from the executive. Academics in Mexico have stated that the Human Rights National Commission has not generated any mechanisms towards the development of an accurate system of accountability that would generate trust and civilian participation for the protection and exercise of human rights.<sup>617</sup> Ackerman has even stated that in situations like the Ernestina Ascencio case (described in the first chapter), the National Commission acted as an

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<sup>615</sup> *ibid*

<sup>616</sup> Backgrounder (n 564) 4

<sup>617</sup> C.E. Mayer-Serra, A.L. Magaloni Kerpel, “Our expensive human rights defenders: the case of the Human Rights National Commission. Series on the Use and Abuse of Public Resources – Debate Notebook No. 3” (*CIDE*) 2  
<[http://www.cide.edu.mx/cuadernos\\_debate/CNDH\\_CEMS\\_AMagaloni.pdf](http://www.cide.edu.mx/cuadernos_debate/CNDH_CEMS_AMagaloni.pdf)> accessed 25 June 2014

accomplice to the government of Felipe Calderón.<sup>618</sup> It has also been proved that public trust in the most important Human Rights institution in Mexico has been declining since the war against drugs started.

While the figure of an ombudsman in Mexico is established in article 102 of its constitution, a strictly military figure has not been created at the moment of this writing. The main reason of why Germany was chosen as a point of comparison for this research is due to the fact that the figure of the German military ombudsman has served as an inspiration to similar reforms, such as the case of the Irish military ombudsmen (which will be analysed in the next chapter), and also its Canadian colleague, to name two examples of countries which have achieved positive standards of democratic policies. It should be noted that the first military ombudsman figure was established in Sweden in 1915,<sup>619</sup> and it was given the name of *Militieombusmannen*. This figure was developed in order to supervise the military personnel and authorities, but apart from such aspect, this office worked in the same way as the civilian –Parliamentary, in the case of Sweden–, ombudsman worked.<sup>620</sup> This early figure served as the main influence for the creation of its German counterpart when their armed forces were rebuilt.

The importance of a military ombudsman has been established earlier in this chapter (public trust in the military increases as their administrative processes become transparent; also, the ombudsman helps shaping civilian democratic controls, as it strengthens the rule of law, human rights within the army, and good governance).<sup>621</sup> The analysis made of the current flaws of the Mexican armed forces has shown that there are no effective civilian mechanisms of control. This not only impacts negatively in civil society, but also affects military personnel, as they have no paths of channelling their complaints outside the military system, which has a deficit of transparency and access to justice is very limited at the moment. The human rights of the soldiers are not the only matters that an ombudsman would be able to address, but also issues of an administrative nature and general issues like the inequality in wages would be a subject that the military ombudsman would be

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<sup>618</sup> R. Martínez, "To the Human Rights National Commission, the case of the indigenous women who was raped and executed by the military in 2007" (*Proceso* 01 November 2011) <http://www.proceso.com.mx/?p=286911>, accessed 25 June 2014

<sup>619</sup> Backgrounder (n 592) 2

<sup>620</sup> R.B. Ginsburg, A. Bruzelius, *Civil procedure in Sweden* (Columbia University School of Law Project on International Procedure 1965) 26

<sup>621</sup> H Born, I Leigh (n 591) 230

qualified to settle. The subsequent comparison between Germany and Mexico will also cover this topic, but we can conclude this section by stating that a commissioner of the armed forces that had a civilian nature and was accountable upon the Federal Congress would constitute a qualitative improvement for the rights of the soldiers and civil-military relations in Mexico.

#### **4.2.6 The use of military courts in Mexico**

Another very important matter of comparison between Germany and Mexico regarding military affairs is the use of military courts. With the recent Military Justice Code reform in Mexico, a soldier can be tried by civilian courts in the case of committing human rights violations against a civilian. In all other cases the soldiers will be tried in military courts at any point. In the German system the difference is broad: article 96(2) of the German Basic Law establishes that during peace-time no soldier will be tried by military courts for crimes committed inside German territory.<sup>622</sup> This implies again that the State is being congruent with the principle of the “citizen in uniform”, and will not make distinctions between the military and society as long as a state of defence is not declared. The current security strategy in Mexico has been justified stating that organised crime groups represent a threat to Mexican society, but until this day no federal administration has declared a state of emergency -and until the 2016 constitutional reform of article 29 a state of emergency was not even contemplated in the constitution-. Up until the new reform, all domestic crimes committed by military personnel had been handled by military courts. Unfortunately, the recent reforms leave legal holes, such as not defining which jurisdiction will investigate and try the soldiers who commit crimes against civilians but do not violate human rights. Will the soldiers keep being tried by military courts, leaving the civilian victim defenceless from a jurisdictional view?

As it has been established previously in this research, the new reform gives legal jurisdiction to civilian prosecutors and courts to investigate and try military personnel that are accused of being involved in a human rights violation against a civilian, but the figure of a military ombudsman has not developed yet. The current director of the commission does not have any type of special attribution that will separate him from both the executive and the legislative organs, as its German counterpart does have.

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<sup>622</sup> Basic Law (n 312) art 96(2)

As the army is deployed in Mexico without a state of emergency being formerly declared, the abolition of the military courts in non-emergency times would allow the citizens to have access to justice with transparency and promptness. The reach of civil justice regarding the soldiers should not be limited only to the judicial system; it should also include all the investigations. The new reform allows civilian courts trying cases dealing with human rights abuses where the army is involved, but the civilian prosecutors are very limited by the information that the military investigators provide. The handling of the cases should be exclusive to civilian authorities at any point of the investigation, as this reduces bureaucracy and increases transparency to the whole process. The Military Justice Code reform of article 57 is welcomed, but it falls short, because the whole military justice structure continues to work under complete secrecy and lack of accountability mechanisms. Unless the armed forces handle themselves in a culture of legality and state of law, civilian authorities should have the monopoly of handling investigations and trials.

#### **4.2.7 The soldiers' rights**

The Mexican Military Justice Code establishes on its article 119 fraction VI that a soldier will not be responsible for following an illegal order as long as the personnel did not have knowledge of the unlawfulness of it; the same fraction establishes that such unlawfulness must not be “notorious”.<sup>623</sup> This article does not give any further explanations as to what is considered as unlawful or “notorious”. To illustrate the lack of clarity of the Military Justice Code, it is relevant to analyse article 294, which describes the concept of “Abuse of Authority” (this article, as we have described previously on this research, has been used to prosecute military personnel for acts such as enforced disappearance). This provision states that there will be a penalty of four months of prison for the superior that gives an order to an inferior, which among other descriptions, might “....cause (the inferior), to engage in obligations that might be harmful to the performance of its duties”.<sup>624</sup> This provision is unclear and does not explain the extent of freedom to object an order that a soldier has.

If military personnel must behave and act upon International Law standards, then article 407 fractions V would contradict the freedom of military personnel, as it punishes the “muttering or censoring of superior dispositions”.<sup>625</sup> The article does

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<sup>623</sup> Military Justice Code 2014 (MEX) art 119 [VI]

<sup>624</sup> *ibid* art 294

<sup>625</sup> *ibid* art 407 [V]

not specify which type of order censoring or muttering would be punished, so it can be inferred that military personnel do not have any path to channel their discomfort (even the “murmuring”, which is interpreted as a confidential complaint), without facing any type of consequences. These prohibitions are also expressed on the Disciplinary Law of the Mexican Army and Aerial Force; its article 8 leaves no room for any debating –and even less the disobedience of any orders-, as it states that every military personnel that commands troops shall not allow or spread any “gossips, complaints, or dissatisfaction that could prevent the fulfilment of the subordinated, or lower their encouragement”.<sup>626</sup> Under these assumptions, the possibility of any expression of discontent is completely restricted, even if it is not an aggression or an encouragement to violence.

The *Soldatengesetz* summarises the way in which loyalty and freedom of conscience can coexist during the duties of military personnel. In the Mexican case it is harder to understand the limits of a soldier’s performance: the Code of Conduct mentions in its section N (a) and (b) that the application of Loyalty is the sincere devotion towards the nation, superiors, inferiors and colleagues. By its part, section O (a) and (b) states that military personnel must respect and guarantee human rights according to “the principles of universality, interdependence, indivisibility and progressiveness, as well as International Humanitarian Law rules”.<sup>627</sup>

It is relevant to cite American militarism at this point. The American Air University (considered an intellectual think tank for the air forces in the US), has published academic debates in which they have recognized a large degree of such freedom for their military, with only the following acts being considered criminal laws: “disrespectful speech towards superiors; use of words or gestures that might provoke a fight; disclosure of classified information; discussing official matters outside of the military without proper authorization”.<sup>628</sup> Where the US military codes have clearly defined the limits of speech, the Mexican disciplinary code is undeveloped and the restrictions are highly broad, which goes in direct contradiction with the German idea of the military having the same fundamental rights as a citizen.

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<sup>626</sup> Disciplinary Law of the Mexican Army and Aerial Force 2004 (MEX) art 8

<sup>627</sup> National Defence Secretary Public Servants Code of Conduct 2013 (MEX) sect O

<sup>628</sup> “Rights of Military Members” (*Air University*)  
 <[http://www.au.af.mil/au/awc/awcgate/law/rights\\_of\\_military\\_mbrs.pdf](http://www.au.af.mil/au/awc/awcgate/law/rights_of_military_mbrs.pdf)> accessed 09 July 2014

The spirit of conscientious freedom that the basic personnel have in the modern German state contrasts in a clear way with the orthodox model of obedience and loyalty that prevails in Mexico. Not only the Mexican Disciplinary Law establishes very severe prohibitions against the censoring of superior orders, but the General Duties Regulation of the Military states in its article 26 that the personnel must not “manifest any repugnance in obeying superior orders in their conversations, not censoring them or allow their inferiors to do it, even when these might originate an increase in their fatigue”.<sup>629</sup> It should be noted that this regulation was published by the Official Diary of the Federation in 1943, and it is still part of the legal order of the Mexican military at the moment of this writing.

It can be established that the relevant provisions concerning order obedience in Mexico are outdated and do not reflect the spirit of contemporary militarism in consolidated democracies. The lack of more information and academic discussion on these secondary regulations is the consequence of the secrecy and isolation that the military has been subjected to. In Mexico, any behaviour that can be considered as disobedience to an order from a superior is punished, and the most extreme provision, article 8 of the Disciplinary Law of the Mexican Army and Aerial Force, punishes any expression that might be considered as dissatisfaction for the order received. This is a contrast with the principles that the soldiers are asked to respect and guarantee (universality, interdependence, indivisibility and progressiveness, as well as International Humanitarian Law rules<sup>630</sup>). It is understandable why a high number of military personnel desert from the armed forces at some point; there is an oppressive culture that encourages submission, and at the same time, there is no figure or institution that will address their complaints and also work on the interests of every member of the army.

#### **4.3 Final considerations about the current Mexican civil-military relations**

Certainly, the authoritarianism of the Mexican State cannot be compared to the situation in Germany during the Second World War in terms of the global repercussions it had. However, civil-military relations in Mexico are highly undeveloped and the fact that the National Defence Secretary was leading the

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<sup>629</sup> General Duties Regulation of the Military 1943 (MEX) art 26

<sup>630</sup> National Defence Secretary Public Servants Code of Conduct 2013 (MEX) sect O

number of complaints for human rights abuses at the end of 2013,<sup>631</sup> paints a bleak picture of contemporary civil-military relations; no institution that can monitor and regulate these relationships has been developed until the moment of this writing.

The Mexican military system would benefit from a whole institutional restructuring with similar elements like its German counterpart. The soldiers must feel part of civil society (entitled to the same rights and obligations), and it would be highly beneficial for the constitution to expressly establish a set of “citizen in uniform” principles that would not only benefit the relations between the armed forces and society, but would also provide the soldiers with more protection and would dignify their work.

The military commanders are still very reluctant to accept any scrutiny from outsiders, even when they are sent by prestigious international institutions, like the case of the GIEI and the Ayotzinapa case. In this case, only a combination of institutional and legal reforms can give the common citizen access to more influence on the shaping of military policies. The National Defence Commission in the federal congress must push for a proper set of constitutional guidelines made exclusively for the armed forces, which should establish the principles of a militarism based on conflict prevention.

The new set of constitutional provisions should also establish the creation of civilian mechanisms of control and policy shaping over the military. Constant collaboration between the legislative and NGOs specialised in conflict prevention and social re-adaptation would be ideal, as decades of constant isolation from society have shaped a highly undemocratic military culture. The creation of an ombudsman dedicated exclusively to military issues is a priority for the Mexican State if there is real political will to reform the armed forces. The military in Germany always has a focus on conflict prevention, resorting to violence only as a last option; this has been highly innovative as the military culture is design to kill, not to prevent. This is why an indefinite deployment of the military to perform security tasks in a domestic conflict is so dangerous. The lack of a culture of prevention on highly armed soldiers that are in direct contact with civilians on a daily basis can aggravate the conflict and alienate society from the military, as the current Mexican conflict exemplifies.

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<sup>631</sup> E. Álvarez, “SEDENA leads number of complaints upon the CNDH” *Milenio* (Mexico City 30 December 2013) <[http://www.milenio.com/region/Sedena-encabeza-cifra-denuncias-CNDH\\_0\\_217778222.html](http://www.milenio.com/region/Sedena-encabeza-cifra-denuncias-CNDH_0_217778222.html)> accessed 16 September 2014

The 2014 Military Justice Reform is a step forwards in the process of civilian accountability on the subject of human rights abuses. Unfortunately, this is not enough to improve civil-military relations in Mexico; the lack of a proper training to the soldiers, which would require educating all the personnel on a new style of militarism focused on conflict prevention and on a strong understanding of human rights, would allow the citizens to coexist with the armed forces in a positive light. The vast quantity of Mexican secondary regulations creates confusion and the principles which guide the conduct of the soldiers are difficult to understand, as they lack a coherent structure. The constitution should include an organised chapter dedicated to the armed forces, their main attributions, and the power that the civil State has over them.

It is clear that there is a gap of legality and institutional development in the current public deployment of the Mexican armed forces, but the main focus of this research is to develop theoretical ground for an improvement in civil-military relations. Northern Ireland is the next comparison which will be made in contrast with Mexico, as its situation during the second half of the XX century draws various similarities with the current situation in the Latin American country.



## **Chapter V**

### **An analysis on the state of emergency in Northern Ireland during the 1970s and beyond: civil-military relations in a domestic conflict**

This part of the current research focuses on Northern Ireland as a source of comparison with the current Mexican domestic conflict. Why is this particular country selected for a comparison with, what seems on the surface, a Latin American country with a very different historical, sociological, and legal development?

This chapter will address the way in which the Northern Irish government, and subsequently the British government, reformed legal structures in order to settle the presence of the British Armed Forces, declare a state of emergency and adapt the Northern Irish civilian security bodies. Civil-military relations are the main source of focus here; the aim is to provide a point of reference for the current civil-military issues which have become a crisis in Mexico over the past 9 years. There are certain key aspects which give legitimacy to this comparison: both countries experienced an internal conflict in which the threat to the State and the rule of law did not come from an outside power. Secondly, the sources that presented the threat to the State in both countries can be classified as a “non-State actor”, which means that the institutions and the wellbeing of society as a whole had been jeopardized by groups of actors within the same territory. A third point of relevance for the purpose of this comparison is the fact that in both cases the State arrived to the conclusion that the civil security bodies did not meet the expectations required to counter-attack the threats; this became the main reason to deploy the armed forces on their own territory, even though, such security bodies were not prepared to perform on their own territory, clashing with non-state actors. As a result of this lack of knowledge from the armed forces, various conflicts arose between the civilians and the army; numerous episodes of human rights abuses have been documented in both cases, and they have caused concern and pressure from international legal institutions.

The emergency regime caused a high level of collateral damage. For example, the Northern Ireland Criminal Law Act 1967 art 3(1) established the level of force that security personnel could use to prevent a crime or make an arrest. However,

this power was used by members of the security forces to make extrajudicial killings, where the targets were not a threat that justified the use of lethal force. As it is shown in this chapter, there is evidence that this behaviour was allegedly adopted by military commands, being popularly known as the “Shoot-to-kill” policy. This policy was not legally authorised by the British government, and as it will be addressed in this chapter, with the *McCann and Others v The United Kingdom* as case study, a number of officers were tried for breaching fundamental rights.

This and other emergency measures are described here. The goal is to address the way in which they affected the democratic order and what were the consequences regarding respect to human rights. Testimonies from military personnel deployed in the areas of conflict are also included, as they give a deep insight of the whole situation from their perspective, which is congruent with the focus on the right of the soldiers of previous chapters in this research. Any analysis of any armed conflict cannot be regarded as complete without discussing the perspectives from every side. A mention of the most important commissions created after the conflict is also relevant, as many victims and their relatives are still claiming for justice, so it is an imperative for any democratic State to revise all the cases in which allegations of human rights abuses have been lodged.

## **5.1 The background that gave birth to the armed conflict in Northern Ireland**

With the Act of Union of 1800 the integration of Ireland and Great Britain became a reality; such union divided Northern Irish society, and since the end of the nineteenth century and the start of the twentieth century, the differences between the supporters of Northern Irish independence and the unionists became increasingly problematic. As the island got split into Northern and Southern Ireland, the tensions on the northern side kept on rising since the republicans felt that they had no real sovereignty in important matters such the use of armed forces and foreign affairs, which were controlled from Westminster.<sup>632</sup> According to Mansergh, the feuds and animosity between the protestant and the catholic community became more intense in the last two decades of the nineteenth century.<sup>633</sup> Plus, the difference in the quality of living between the north and the south of Ireland became broader as time passed by.<sup>634</sup> The industrial revolution brought an exponential

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<sup>632</sup> The National Archives, *The Bloody Sunday Enquiry* vol I c 7 [7.4]

<sup>633</sup> N Mansergh, *The Irish Question 1840-1921* (George Allen &Unwin Ltd, London 1965) 185

<sup>634</sup> *ibid* 186

growth of the population in Belfast (Northern Ireland), but the workers lived under low wages and bad housing conditions, and in 1886 such issues became the subject of political alliances and got tied with a religious division. Mansergh states that after this year Protestantism became a synonym with Unionism, and Catholicism became a synonym with Nationalism.<sup>635</sup>

The republicans did not approach the dependency from the British monarchy in a positive light. An important point to address here is the creation of the Royal Ulster Constabulary (RUC) in Northern Ireland that replaced the Royal Irish Constabulary (RIC). This body would also have additional aid, which was another body of civilian police called the Ulster Special Constabulary.<sup>636</sup> These security bodies were given legitimacy under The Civil Authority (Special Powers) Act 1922, which can be considered as one of the first emergency powers acts in the twentieth century. This act gave powers to the Northern Irish Minister of Home Affairs, in order to “gave the minister power to make further regulations, each with the force of a new law, without consulting parliament, and to delegate his powers to any policeman”.<sup>637</sup> Subsequent amendments to this legislation would include controversial measures such as Internment (detention without trial), which is also analysed in this chapter.

As Mulcahy states, the RUC always faced a deficit of legitimacy in the eyes of the Northern Irish population, both republicans and nationalists, because the main purpose of this body was to police and apply enforcement to both groups;<sup>638</sup> such body had a specific political function, so this entered in conflict with civilian society. An important aspect, which can draw a social parallel with Mexico, is that the more privileged sectors of society were untouched by the State repression, as the author states that certain suburbs were under a different type of policing, or as he calls it, “normal policing”<sup>639</sup>. This situation also caused class tension and a sense of social oppression with a sector of Northern Irish Society.

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<sup>635</sup> *ibid* 186-187

<sup>636</sup> A Mulcahy, *Policing Northern Ireland – Conflict, legitimacy and reform* (Willan Publishing 2006) 7

<sup>637</sup> M Farrell, *Northern Ireland: the orange state* (London 1998) 93

<sup>638</sup> A Mulcahy (n 636) 9

<sup>639</sup> *ibid*

## 5.2 An introduction to the twentieth century Northern Irish security legal background

The first legal framework that gave power and legitimacy to the Northern Irish Parliament in matters relating security was the Ireland Act of 1920. In its 4th chapter, such framework states in its fourth section that both the Northern and the Southern Irish Parliaments will have power in order to legislate laws about matters like peace, good government, and order. However, the same framework also restricts both parliaments to legislate the process of making war or peace, and issues concerning a state of war. Predominately, Westminster had complete control over such subjects.<sup>640</sup> This was the start of a process of resistance by part of the more radical nationalist sector, as they felt that Ireland as a whole had no real sovereignty from the United Kingdom. This situation was especially sensible among the republicans, who opposed to the English monarchy since the unification of Northern Ireland with the United Kingdom. In 1922 a new legislation was introduced to replace the Restoration of Order in Ireland Act (ROIA), this act was the Special Powers Act (SPA). As Donohue states, one of the main reasons for the Northern Irish society to become polarized and for the IRA to radicalize in a steady way, was the fact that the SPA was developed as a legal tool to be used under emergency situations. But as time passed by, it started to be engrained in the structural system of the security political structure.<sup>641</sup> In Northern Ireland, the British Army had a garrison until 1969, when both the RUC and the B Specials failed to contain the protests and maintaining peace-keeping. McVeigh considers this event as crucial to understand the subsequent changes in the security strategy, as the soldiers took a much more explicit approach to internal safety, with the State's acknowledgment of such situation.<sup>642</sup>

The SPA contained highly controversial points like the banning of different political expressions and newspapers; cultural events were also forbidden, such as the prohibition to celebrate Easter from 1926 to 1949. The ban was renewed annually after this year, which could coincide with the introduction of Freedom of Expression in article 19 of the Universal Declaration of Human Rights in 1948, but such coincidence is mere speculation. The article in question was located in

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<sup>640</sup> Ireland Act (NI) 1920

<sup>641</sup> L.K. Donohue "Regulating Northern Ireland: The Special Powers Acts. 1922-1972" (1998) 41 *The Historical Journal* 1089, 1090

<sup>642</sup> R. McVeigh, "It's part of life here...." – *The Security Forces and Harrasment in Northern Ireland* (Committee on the Administration of Justice, Belfast 1994) 27

schedule 3, and it specifically stated that authorities had the power to restrict or forbid “the holding of or taking part in meetings, assemblies (in fairs and markets), or processions in public places”.<sup>643</sup> It also included powers of arrest given to the civilian authorities in case of the violation of its regulations. There is an extensive amount of discussion of the period comprehending 1920-1968; but for the purpose of keeping the discussion centred on the stage where emergency powers were established, this chapter will be focused on the period after 1968, where the armed forces had the primacy of fighting the domestic situation.

### **5.3 The “Troubles” and the deployment of the armed forces: its consequences among the population**

When the time came for the armed forces to be deployed on Northern Irish territory, their personnel was not ready for performing security tasks out of their environment. Hamhill established that the Army’s past experiences have always had a colonial aim; when they were deployed on Northern Irish streets, especially the cities of Belfast and Londonderry, they did not know who were they fighting, or if they were acting in order to help civilian security forces.<sup>644</sup> It seems that the government did not realise that it is fundamental to give proper training to the soldiers before deploying them in a conflict dealing with non-state actors, as one of the basic matters is training its personnel to have a positive co-existence with the civilian population. The Hunt Report (which will be explained in more detail later in this chapter), established that the security experts based the decision on deploying paramilitary groups on experiences that they previously had in India, but had to acknowledge that the circumstances and historical context in Northern Ireland was highly different.<sup>645</sup>

The feeling of bias and discrimination that a sector involved in the conflict sensed becomes relevant when a demonstration that took place on the 5<sup>th</sup> of October 1968 in Londonderry ended in extreme violence, as the police proceed to use water cannons and batons in order to disperse a civils rights march. The official from the media established that 30 persons, among them underage citizens and an MP (Gerard Fitt) were injured. The ground for making claims of discriminatory

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<sup>643</sup> Special Powers Act (NI) 1922 schedule 3

<sup>644</sup> D. Hamhill, *Pig in the Middle: The Army in Northern Ireland 1969-1984* (Methuen London Ltd 1985) 21

<sup>645</sup> Home Office, *Report of the Advisory Committee on Police in Northern Ireland* (Cmnd 535 1969)

practices was the fact that the march was organised by the nationalist supporters, who were in their majority Catholic, and the Ireland Civil Rights Association (NICRA), gave them support to organise the event.<sup>646</sup> The main goal of this demonstration was to demand better social policies that would improve the conditions of the Catholics, among them employment and housing.<sup>647</sup> Even though the early reports from the media stated that around 30 persons were wounded, recent reports -such as the one made by the Conflict and Politics in Northern Ireland website-, state that around 77 civilians and 4 members of the RUC were injured. Approximately 100 persons had to be treated in hospitals, and more of them received first aid in public spaces.<sup>648</sup> Although during the 1960s the situation between the IRA and the RUC had been hostile, it still had not caught the attention from outside until the television and newspapers reported this incident.

After the Londonderry march, a series of protests continued during 1968 and 1969, with another extreme violent clash taking place in Burntollet Bridge on Saturday 4<sup>th</sup> of 1969, as there was a confrontation between marchers from People's Democracy and a loyalist mob. The protesters established that the RUC's officers who were escorting the march did not meet their expectations, as they appeared to act passively as the loyalist mob attacked them, and when they arrived to Derry they were attacked again. After these events, a rally that was supposed to take place at the arrival of the march was broken by the RUC; this angered the protesters and riots began.<sup>649</sup> These actions affected the legitimacy from the RUC, and accusations of bias and discrimination were raised.

The government knew that they would have to make drastic changes in order to prevent the situation from getting out of control, so one of the first reactions from the failures shown by the security forces was the disbandment of the B Specials. This force worked as a type of paramilitary force to help civilian forces, and was created in 1920 by then Northern Irish Prime Minister Lord Brookeborough,

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<sup>646</sup> "1968: Londonderry march ends in violence" *BBC Home* (London 05 October 1968) <[http://news.bbc.co.uk/onthisday/hi/dates/stories/october/5/newsid\\_4286000/4286818.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/october/5/newsid_4286000/4286818.stm)> accessed 23 October 2014

<sup>647</sup> M Melaugh, "The Derry March – Main Events of the Day" (*CAIN Web Service* 30 July 2014) <<http://cain.ulst.ac.uk/events/derry/sum.htm>> accessed 23 October 2014

<sup>648</sup> *ibid* 2014

<sup>649</sup> *ibid*

who regarded himself as the 'father' of such force.<sup>650</sup> But what caused the structural changes in security matters? In order to analyse how the Northern Irish security strategy developed, it is relevant to explain the conclusions to which the Northern Irish government would arrive, that would lead them to giving the lead of security to the army. The government had recognised that the situation was getting out of control and that the security bodies had been the object of scrutiny under the population's eyes.

#### **5.4 The Hunt Report**

The importance of this report resides in the fact that it was the first major institutional restructure after the violent events of the 1960s. It is relevant to see what were the decisions taken by the government, as the Northern Irish stability was at a very weak point. In order to make a subsequent comparison with the Mexican legal reforms, it is important to establish the arguments that gave way to the Northern Irish reforms.

The Minister of Home Affairs of Northern Ireland appointed several members and consultants from the security minister to implement reforms in the security strategy, as they had realized that 1968 and 1969 had been years especially difficult for the development of the current strategy which the Northern Irish government had planned. It is interesting to see that the government blamed the media for "magnifying, in the minds of readers and viewers, the actual extent of the disorders"<sup>651</sup> This was most probably related to the fact that a situation which had been ignored outside Northern Ireland, was finally exposed after the incidents of the march in Londonderry. Regardless of the former statements, the Advisory Committee had to accept that changes in the security strategy and new policies had to be implemented; their aim was to create a better relationship between everyone involved in the conflict. On the report conclusions it was established that the role that the Ulster Special Constabulary (USC) had been performing would be split and two separate forces would perform such tasks;<sup>652</sup> the report also established that police force needed to be impartial and accountable, apart from having a civilian

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<sup>650</sup> S Elliott, WD Flackes, *Conflict in Northern Ireland – An Encyclopaedia* (ABC-CLIO, Oxford 1999) 640

<sup>651</sup> Home Office (n 645)

<sup>651</sup> *ibid*

<sup>652</sup> *ibid*

<sup>652</sup> *ibid*

nature, so it was decided that officers should only carry firearms and certain circumstances.<sup>653</sup> This was probably a reaction to one of the main criticisms of the specialists, which was the lack of ability from officers to use non-violent methods, as it was stated that the senior officers viewed the strength of force as the only way to keep peace.<sup>654</sup>

In total, there were dozens of recommendations made in the Hunt Report; among the most relevant ones were: the plea for separating the RUC from performing duties of a military nature; the creation of a Police Authority for Northern Ireland, the creation of the Police Advisory Board, whose main task would be establishing consultation between all ranks of force and the Minister; a civilian officer specialised in welfare should be appointed to the RUC, and such officers should stop using armoured cars; new policies to increase the entrance of Roman Catholics in the security ranks; a reform in the procedures for complaints against security forces; the establishment of responsibility for wrongful acts could now be attributed to the chief office of police; a committee specialized in police liaison would be established in Londonderry; and another important point that has a direct relation with State accountability was the recommendation for the Central Representative Body located in Northern Ireland, to associate with its counterpart located in Great Britain. This had the aim of enforcing members of the security bodies to be enquired about their wages and matters related, as the security bodies in GB were already subjected.<sup>655</sup> As we can see, the main focus of the Hunt Report was on regulating the excess of power and impunity that the security bodies (mainly the RUC and the USC had), and also gather various military aspects from the security strategy.

### **5.5 The government's justification for the deployment of the armed forces**

In the context of the Northern Irish conflict, the first event which shocked the nation's political stability and forced the government to make substantial changes was the Londonderry march in 1968. The events taken place obliged the Westminster government to develop a new kind of security structure that would replace the current one, which was getting out of control. After the political instability that Bloody Sunday caused, the government decided to implement the indefinite deployment of its armed forces, with the introduction of the Emergency Provisions

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<sup>653</sup> *ibid*

<sup>654</sup> S Elliott, WD Flackes (n 650) 642

<sup>655</sup> Home Office (n 645)



Act 1973, which is based on an emergency powers legal background; this legislation was the replacement of the Special Powers Act and the Detention of Terrorists Order.

The EPA 1973 contained various controversial points that were established in an attempt to normalize the difficult chain of events. These provisions included the powers of the security forces for the arresting, search and seizure, and detention of any citizens who might fall under the suspicion of being involved in terrorism.<sup>656</sup> Such attributes to search did not stop at a personal level, but the Act granted the right to the security bodies to search any premises or places where a person who falls under the suspicion of terrorism was based.<sup>657</sup> Paragraph 5 of the same article makes no distinction in the judicial situation of a terrorist and a citizen who is under the suspicion of terrorism, as it established that such provisions would have an effect on the detention of both terrorists and persons suspected of being terrorists<sup>658</sup>, this last sentence is ambiguous at best, as it does not make a clear description of the legal argument which would make a distinction between arresting someone whose terrorist activities have been proved, or a citizen *suspected* of terrorism. The description leaves theoretical gaps, because it does not explain if the term “terrorist” is used on the case of arresting a person who has already been convicted of terrorism, while at the same time makes a distinction with persons who are *suspected* of terrorism. If a distinction was to be made, the Emergency Provisions Act should have also established the difference in the conditions that both types of citizens experience during detention time, as the ICCPR had already established at that time in article 10 paragraph 2(a), the need for a physical separation between accused and convicted persons in order for both to receive different treatments in this stage.<sup>659</sup>

## **5.6 The emergence of the army as the primary security body**

The casualties which took place on Londonderry in 1968 and the subsequent riots, led then-governor of Northern Ireland (Chairman: Lord Cameron) to appoint a Commission which investigated the events that took place 1968-1969. It should be mentioned that by this point (1969), the number of soldiers on the

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<sup>656</sup> Emergency Provisions Act (NI) 1973 section 10 [1]

<sup>657</sup> *ibid* section 10 para [2]

<sup>658</sup> Emergency Provisions Act (NI) 1973 section 10 para 5

<sup>659</sup> ICCPR 10[2]

Northern Irish streets consisted of 8,000, which contrasted with the 2,000 armed personnel that were sent to do security tasks when the “troubles” started.<sup>660</sup> Such commission addressed important points about the actions of the security bodies (mainly the RUC) in their conclusions. In its chapter 16 (para 230), the commission established that the RUC lacked legitimacy, as the people thought that such force body operated as a “hand” of the Home of Minister Affairs and recommended to generate a truly impartial institution.<sup>661</sup> In 1971 then-Prime Minister James Chichester-Clark launched one of the biggest offensives against the IRA after they lured and killed three soldiers who were off-duty having drinks at a pub; he proceeded to request from the British government a total of 1,300 troops.<sup>662</sup>

Another episode of great importance that triggered a strengthening of the enforcement strategy was a soldier who was blown to pieces while he was urging both adults and children to evacuate a place in which an IRA member had dropped a suitcase containing explosives;<sup>663</sup> he was posthumously awarded with the George Cross. Coogan has established that one of the main reasons which made the IRA a more powerful and radicalised group was the fact that by 1971 they finally had a large support of the Catholic population, which were much more reluctant to engage in criminal activities during the stage comprehending 1956-1962, but by 1971 the Nationalists would not accept any more repression from the Unionist government.<sup>664</sup> It is important to note that one of the key events which would set the political will to develop a more repressive strategy was the speech that prime minister Brian Faulkner gave to the army on 25 May 1971, in which he stated that any soldier may fire against any person who carried a weapon or *acted suspiciously*,<sup>665</sup> even without an order from his superiors. This statement was not well received, and in fact, Faulkner was inquired about it, being forced to clarify that the phrase “acting suspiciously” was related to “circumstances in which firearms or explosives might be

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<sup>660</sup> K Jeffrey, “The British army and Ireland since 1922” in T. Bartlett and K. Jeffrey (eds), *A military history of Ireland* (Cambridge University Press 1996) 451

<sup>661</sup> Home Office *Disturbances in Northern Ireland – Report of the Commission appointed by the Governor of Northern Ireland* (Cmnd 532, 1969) [230]

<sup>662</sup> G Walker, *A history of the Ulster Unionist Party* (Manchester University Press 2004) 173

<sup>663</sup> TP Coogan, *The Troubles: Ireland's Ordeal 1966-1995 and the Search for Peace* (Hutchinson, London, 1995) 118

<sup>664</sup> *ibid* 123

<sup>665</sup> *ibid* 123

used”.<sup>666</sup> Even though the ex-prime minister never referenced a legal framework for his statement, he might have been referencing the Criminal Law Act (Northern Ireland) 1967 3(1), which referred to the use of force when making an arrest, and was in force when Faulkner made that statement.

## 5.7 Bloody Sunday

The events taken place on the 30<sup>th</sup> January 1972 marked a turning point on the whole Northern Irish conflict, as it was catalogued as the biggest massacre up until that point. The Northern Ireland Civil Rights Association (NICRA) organised a march in order to protest against the policy of internment. Even with the previous reports of human rights abuses made public, no march had been as successful in attendance as this one; official records estimate between ten and twenty thousand persons, including underage citizens and women. The atmosphere -although grounded on an ideology of struggle and protest-, was positive and had a positive feel to it.<sup>667</sup> The British Army had previously banned the march, so the protesters relocated to the spot known as “Free Derry Corner” and at this point tension started building for some of the attenders, assaulting the soldiers with stones as a consequence

According to the Saville Inquiry, a turning point for the fate of many peaceful demonstrators was the fact that one of the colonels (Colonel Wilford specifically), deployed more companies in vehicles than what he was authorised by his Brigadier. As the soldiers had previously identified the location of the rioters and the peaceful attenders, the deployment of armed personnel in a different place than the one agreed caused confusion to establish the identities of the attenders.<sup>668</sup> The report concluded that Wilford did not set any limits to the Support Company on their actions, as he had not been given permission to chase the attenders in a certain area (Rossville Street).<sup>669</sup> The Parachute Regiment began to arrest and

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<sup>666</sup> Department of the Foreign Affairs, “Statement by Northern Ireland Prime Minister Brian Faulkner condemning the Irish Republican Army attack on Springfield Road Royal Ulster Constabulary/British Army base, Belfast, and confirming that the security forces are permitted to use live fire against people observed to be acting suspiciously” (*National Archives Ireland* 2002) <[http://cain.ulst.ac.uk/nai/1971/nai\\_DFA-2002\\_19\\_457e\\_1971-05-26.pdf](http://cain.ulst.ac.uk/nai/1971/nai_DFA-2002_19_457e_1971-05-26.pdf)> Accessed 27 December 2016

<sup>667</sup> Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland* (Her Majesty’s Stationery Office, Norwich 1999))

<sup>668</sup> Saville, Hoyt, Toohey, *Principal Conclusions and Overall Assessment of the Bloody Sunday Inquiry* (Home Office, London 2010) [3.18]

<sup>669</sup> *ibid* [3.20]

counterattack the protesters, and in a span of half an hour the armed forces had murdered 13 unarmed civilians (the soldiers involved in the shootings established that they had been attacked by bombs and guns, but subsequent evidence proved that no one had any weapons like the ones described);<sup>670</sup> other reports indicate that another protester who was wounded died in the hospital a few hours later.<sup>671</sup>

The Saville Inquiry assured that the soldiers were responsible for all the killing made by fire arms.<sup>672</sup> An important point made by the inquiry was the fact that the soldiers did not respect the instructions of the “Yellow Card” handed to them, which stated the only circumstances under which they could open fire against a civilian, as it was established that the attendants murdered did not met such requirements.<sup>673</sup> Northern Irish society was so outraged by these events, that support for the nationalists, and even for the IRA, grew exponentially and a couple of days later the British embassy in Dublin was burned by a mob on the 2<sup>nd</sup> of February of 1972.<sup>674</sup> Bloody Sunday caused a crisis inside the Unionist government, as the Stormont officials were left with no legitimacy -even though they tried to reconcile with the relatives of the murdered, and also tried to release a large number of persons who were under internment at that point-.<sup>675</sup> As a result the British government considered that their Northern Irish counterpart had to step apart and let Westminster to take complete control of everything related with security and order. The Stormont officials did not agree, but they were left with no other option than resigning.<sup>676</sup>

As it can be concluded from both the Northern Irish and the British governments’ actions, State accountability was still a concept that had not been developed up to its current standards at this point because the kind of solutions that were looked were more politically than legally oriented. This is exemplified by the Widgery report of 1972, which was the first commission of inquiry set for establishing the fact and responsibilities of those involved the events of Bloody

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<sup>670</sup> Home Office (n 645)

<sup>671</sup> A. Mulcahy (n 636) 31

<sup>672</sup> Saville, Hoyt, Toohey (n 668) [3.43]

<sup>673</sup> *ibid* 3.70

<sup>674</sup> Home Office (645)

<sup>675</sup> D Hamhill (n 644) 176-177

<sup>676</sup> S. Elliott, W.D. Flackes (n 650) 649

Sunday. The facts used to justify the difficulty of establishing individual responsibility were based on arguments which come across as confusing, such as paragraph 63 which establishes that “In two instances a bullet was recovered from the body, so that the rifle, and thus the firer, was positively identified. But several shots fired by the same rifle cannot be distinguished from one another and there is no certainty that a bullet hit the person at which it was aimed and whose conduct had caused the soldier to fire.”<sup>677</sup> The arguments of this commission also incurred in contradictions on several places, as the Instructions by the Director of Operations for Opening Fire in Northern Ireland document (commonly known as the “Yellow Card”), established that the only situations in which the soldiers could fire their weapons is when, after a warning, there was an identified firearm or petrol bomb carried by the suspect, whereas a soldier could fire their weapon without warning when there was a shooting taking place, or to retaliate fire arms.<sup>678</sup> Contrary to this principle, the Widgery report includes *stone-throwing*<sup>679</sup> as part of the behaviour that can allow the armed personnel to open fire. The commission concluded the topic of soldiers’ responsibility by stating that they could not investigate further on each individual claim of a member of the army firing against an unarmed citizen, stating that *in general* the accounts given by the soldiers were truthful.<sup>680</sup>

In contrast, the Saville Inquiry Report analysed the different violations which were committed during the events of Bloody Sunday; this inquiry stated first of all that the civil rights march which was organised and was the centre of the aggressions committed by the security forces was not the one to make responsible for the casualties. It also stated it was impossible to state that the attacks of the soldiers against civilians were part of a deliberate plan or strategy from the UK government, or as the complainants submitted, part of a “culture” from the army, due to years of emergency power legislation being developed.<sup>681</sup> One of the main themes (which will be analysed later in this chapter), was the number of unlawful arrests made by

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<sup>677</sup> The Rt Hon Lord Widgery, OBE, TD, *Report of the Tribunal appointed to inquire into the events on Sunday, 30<sup>th</sup> January 1972, which led to loss of life in connection with the procession in Londonderry on that day* (1972-4, HL 101, HC 220) [63]

<sup>678</sup> Instructions by the Director of Operations for Opening Fire in Northern Ireland, Restricted Document (LHLPC, Army Cuttings, November 1971) arts 8, 9, 13, 14

<sup>679</sup> Widgery Report (n 677) [94]

<sup>680</sup> *ibid* [104]

<sup>681</sup> Saville, Hoyt, Toohey (n 668) [3.43]

<sup>681</sup> *ibid* [4.4]-[4.7]

the army. In conclusion, the inquiry established that the use of military force in the event caused the opposite effect to the aim that the UK government had, as in the words of the commission:

The firing by soldiers of 1 PARA on Bloody Sunday caused the deaths of 13 people and injury to a similar number, none of whom was posing a threat of causing death or serious injury. What happened on Bloody Sunday strengthened the Provisional IRA, increased nationalist resentment and hostility towards the Army and exacerbated the violent conflict of the years that followed. Bloody Sunday was a tragedy for the bereaved and the wounded, and a catastrophe for the people of Northern Ireland.<sup>682</sup>

### **5.8 The Northern Irish army and its relationship with society before and after the start of the “Troubles”**

While the Special Powers Act definitely had a high impact in the way society interacted with the armed forces, the Londonderry march and especially “Bloody Sunday” (after which, Westminster decided to apply “direct rule”, and prorogue the Stormont Parliament<sup>683</sup>), shaped a different path in the government’s strategy regarding civil-military relations. The new established order provided by the “direct rule”, became legalised in the Northern Ireland (Temporary Provisions) Act 1972. The first provision of its chapter 22 established that as long as the state of emergency kept being active, “the Secretary of State shall act as chief executive officer as respects Irish services instead of the Governor of Northern Ireland”.<sup>684</sup> Subsequently, the Northern Irish Parliament was abolished by the Northern Ireland Constitution Act 1973. It was not until 2007 when direct rule was derogated and the Northern Ireland Assembly was established again.

In this context it is important to analyse what kind of perceptions and complains did the targeted groups, but also Northern Irish society as a whole, had on the army. As it has been stated before, security measures that were legalized or legitimated by an emergency situation eventually normalised through the time. As McVeigh states, a very important point to focus on was not the number of soldiers and civil security guards patrolling the Northern Irish streets, but the kind of tasks that such bodies performed while on duty.<sup>685</sup> The main duties referred to the stop

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<sup>682</sup> Saville, Hoyt, Toohey (n 668) [3.43]

<sup>682</sup> *ibid* [5.5]

<sup>683</sup> R. McVeigh (n 642) 24

<sup>684</sup> Northern Ireland (Temporary Provisions) Act 1972 (NI) ch 22 art 1

<sup>685</sup> R. McVeigh (n 642) 11

and search, arrest, and eventually the right to shoot fire arms against armed civilians; it is important to point out that as early as 1975 the Secretary of State for Northern Ireland had to justify these actions by submitting a report to Parliament, which among other things justified the need to the extraordinary tasks in the following way:

We have been set the difficult task of maintaining a double perspective; for, while there are policies which contribute to the maintenance of order at the expense of individual freedom, the maintenance without restriction of that freedom may involve a heavy toll in death and destruction. Some of those who have given evidence to us have argued that such features of the present emergency provisions as the use of the Army in aid of the civil power, detention without trial, arrest on suspicion and trial without jury are so inherently objectionable that they must be abolished on the grounds that they constitute a basic violation of human rights. We are unable to accept this argument. While the liberty of the subject is a human right to be preserved under all possible conditions, it is not, and cannot be, an absolute right, because one man may use his liberty to take away the liberty of another and must be restrained from doing so; where freedoms conflict, the state has a duty to protect those in need of protection.<sup>686</sup>

McVeigh establishes three main elements of the security bodies in Northern Ireland; these were: The British Armed Forces, which in the official discourse acted as a peace-keeper; a specially recruited police force composed of local members; and, a military team also composed of local members, which served in emergency situations.<sup>687</sup> The lack of accountability between the Northern Irish different security bodies was evident, as the RUC had a stronger control over their actions than the Royal Irish Rangers (RIR), and the British Army, which had no mechanisms of accountability and civilian surveillance.<sup>688</sup> The Stevens Report also established that there was a “culture” of obstruction within both the Army and the Royal Ulster Constabularies, not only in terms of giving access to files and other evidence, but of destroying that very same evidence.<sup>689</sup>

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<sup>686</sup> Home Office, *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland* (Cmd 5847, 1975) [15]

<sup>687</sup> R. McVeigh (n 642) 25-26

<sup>688</sup> *ibid* 37

<sup>689</sup> SJ Stevens, *Stevens Enquiry: Overview and Recommendations* (Commissioner of the Metropolitan Police Service 17 April 2003) [3.1], [3.4]

### **5.9 Were the emergency measures applied proportionately to the scope of the Northern Irish problems?**

The type of armed personnel who were sent by the government has been described by academics like Coogan as disproportionate, as he establishes that at that time the IRA only had around 300 soldiers in its ranks<sup>690</sup>; wherever this data is highly precise or not, it is clear that there was a significant disparity between the number of soldiers and the members of the IRA who were actually armed and had some degree of military training. Jeffrey states that by 1972, when the “Operation Motorman” was carried on, the number of soldiers on the streets reached 21,800 (around July of 1972)<sup>691</sup>. What is also important to note, is that the IRA did have thousands of “closet” supporters who would have been giving not only moral, but also material aid, as cases of IRA members being treated or/and arrested in hospitals is very low.<sup>692</sup>

Donohue establishes that various provisions from the Restoration of Order in Ireland Act 1920 (ROIA) were directly copied to the Special Powers Act (SPA). Among these was the power to forbid public meetings and demonstrations, ban military outfits and uniforms that could indicate a membership to proscribed organisations; the power to establish curfews and; establish requirements to possess explosives, firearms, and even petrol.<sup>693</sup> The SPA did not stop there, but it went further with more notions of enforcement with a repressive nature: it established a curfew that ordered people to stay indoors during a certain period of time, and various restrictions were imposed on public roads and passages. In a span of two years (1922-1924), the government established curfews a total of seventeen times.<sup>694</sup> After this time, the curfew was used more occasionally, as it was less needed.

Donoghue considers that provisions like the ones established in the SPA were highly effective, as the number of political crimes committed dropped down and even though it cannot be established with precision to which degree did the SPA contributed to the regulation of such types of crimes, Donoghue states that the

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<sup>690</sup> TP Coogan (n 663) 113

<sup>691</sup> K Jeffrey (n 660) 451

<sup>692</sup> TP Coogan (n 663) 113

<sup>693</sup> LK Donohue (n 641) 1090

<sup>694</sup> *ibid* 1091



Act's impact should not be underestimated.<sup>695</sup> It is important to make another comparison here; the SPA was created in order to establish emergency powers amidst a conflict which the government considered of a strict political nature; if we analyse the results such act gave until 1968 (when the events from the Londonderry march ended tragically), it can be considered that the measures were successful.

### 5.10 Internment

According to Mulcahy, the change in strategy in favour of a more civilian based force had the intention of giving it a British focus,<sup>696</sup> as the policy contrasted with the military, rigid, and authoritarian approach of the first half of the twentieth century. The downside of downgrading the level of repression was the fact that the IRA continued to scale the level of violence in their attacks; these actions provided the State with a solid argument to introduce the figure known as *Internment*. This concept refers to the faculty that the security forces had in order to keep a citizen detained without a trial; it was launched on the 9<sup>th</sup> of August of 1971, in the context of an operation called Demetrius, and such strategy was recommended by the Stormont Government to the British government. The Special Branch from the RUC went into zones which were considered Nationalist points and arrested 342 men. It was later discovered that many of these men had no connections at all with the Republican Army, and others were activists from the Civil Rights movement.<sup>697</sup> The result had disastrous consequences for the government, as the human rights abuses committed inside the security forces' headquarters became public, and outraged not only the members of the IRA, but the whole Catholic and nationalist community.

According to the National Archives, the types of abuses that were committed forced the creation of the Compton Commission, who elaborated a report in November of 1971. Among the issues reported were: 1) throwing the detainees from a helicopter that stood four feet above the surface, but deceiving them into thinking that the altitude was much higher; 2) putting hoodies over them, depriving the detainees from sleep, starvation, and the use of white noise; and, 3) forcing the detainees to walk on pieces of shattered glass.<sup>698</sup> The Republicans organised a

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<sup>695</sup> Ibid 1092

<sup>696</sup> A Mulcahy (n 636) 30

<sup>697</sup> The National Civil Rights Archive, "History – Internment" (*The Museum of Free Derry*) <<http://www.museumoffreederry.org/history-internment01.html>> accessed 26 October 2014

<sup>698</sup> Ibid

conference where they stated that internment would not intimidate them, and they would hold on still to their strategies and the campaign. By the end of 1971, 139 people had been murdered after the introduction of internment (this is not to say that the purpose of internment was to take the lives of the detained, but such number shows a clear failure in the aims which internment proposed); around this time 7,000 Catholic families were displaced from Northern to Southern Ireland.<sup>699</sup> As it can be seen, the decision to apply policies which contradicted the current standards of human rights only caused the opposite effect of what the Unionist government wanted: it strengthened the radicalization and support for the IRA.

The powers of arrest (which are analysed later in this chapter), at the times of the “troubles” in Northern Ireland are also a controversial matter. The Act established that the forces on duty had the power to arrest without a warrant from the judge, and detain for a period or maximum four hours.<sup>700</sup> Contemporary legal standards on the powers of arrest at an international level should be mentioned at this point; the UN developed the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in its 76<sup>th</sup> plenary meeting (9 December 1988); such framework is dedicated at establishing the minimum principles which must be used from the moment that a person is detained until he is sentenced. Referring to the concept itself, the UN plenary defined the term *arrest* as “the act of apprehending a person for the alleged commission of an offence by the action of an authority”.<sup>701</sup> Also, by the times of the “troubles”, a basic legislation on the methods of arrest had been discussed and issued in the International Covenant on Civil and Political Rights, which was adopted by the UN General Assembly on the 19<sup>th</sup> of December of 1966. The referred covenant set standards for detention on its articles 9 and 10, which establish the procedures that the authorities should follow from the moment of the arrest until the detained person is presented to a judge.<sup>702</sup> Among the measures which the newly formed Stormont government developed was the concept of *internment without trial*. According to academic sources,<sup>703</sup> such measure had been tested before when arresting fascists during

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<sup>699</sup> *ibid*

<sup>700</sup> Emergency Provisions Act (NI) 1973, section 11 [3]

<sup>701</sup> UNGA (n 490)

<sup>702</sup> ICCPR [9], [10]

<sup>703</sup> University of Westminster, “Internment in Northern Ireland: Forty Years On” (*King’s College London*)

World War II. This measure was part of a security strategy called *Operation Demetrius*, and as modern analysis have established, security increased to some very limited degree, but it also made the resistance groups more radicalized, as the SDLP, which was the biggest Catholic party in NI broke relations with the government as long as internment remained a part of their strategy. Bew and Gillespie see the IRA as the main political beneficiaries of such strategy.<sup>704</sup>

The RUC made a list of persons who were targeted as subversive and were being looked as possible candidates for internment. As Coogan states, the strategy went completely wrong as a large part of their lists were not updated; hence, many innocent people were targeted and detained, many of them suffering physical assaults by the armed forces.<sup>705</sup> According to CAIN records, the internment was introduced in August of 1971, and was used continuously until December of 1975; the numbers of people detained were 1,874 Catholic/Republican and 107 Protestant/Loyalist.<sup>706</sup> Even in the case that these figures were not entirely accurate, a definite disproportion can be seen between the numbers of detained persons who were opposed to the Unionist government, and the ones who supported it. Such disproportion had as a consequence a lack of legitimacy in the goals which internment originally had.

The amount of armed personnel who were patrolling the streets did not receive adequate/updated information about the citizens who were involved in the arrest of citizens suspected of terrorism, as 350 persons were arrested and subjected to internment on the 9<sup>th</sup> of August of 1971, but 104 persons were released because the authorities found out that the lists were out of date.<sup>707</sup> These careless acts went completely against contemporary human rights standards by themselves, but the situation got aggravated by the fact that a large number of persons who were arrested were tortured and subjected to degrading treatments. Such actions were commonly known as the “five techniques”, which consisted of sleep

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<<http://www.kcl.ac.uk/sspp/departments/icbh/witness/defence/ireland.aspx>> accessed 31 December 2014

<sup>704</sup> P. Bew, G. Gillespie, *Northern Ireland: A Chronology of the Troubles 1968-1999* (Gill and Macmillan, Dublin 1999) 37

<sup>705</sup> TP Coogan (n 663) 126

<sup>706</sup> “Internment – Summary of Main Events” (*CAIN Web Service*), <<http://www.cain.ulst.ac.uk/events/intern/sum.htm>> accessed 12 December 2014

<sup>707</sup> TP Coogan (n 663) 126

deprivation, starvation diets, white noise, hooding, and the enforcement of spread angling against a wall for hours.<sup>708</sup> The complaints against the controversial measures taken by the government gave way to such a high level of polarization and complaints of human rights violations that a commission, led by Sir Edmund Compton, had to be formed in order to investigate the events; this report was elaborated in August 1971. The document stated that internment had been introduced in order to counter-attack the increase of the ruthlessness of the IRA's actions, as according to the report, they had killed 104 innocent civilians between 1969 and 1971.<sup>709</sup> This fact -among other circumstances-, had forced the government to take measures as the subversive actions had reached a very difficult point with no signs of returning to a friendly relation. On the 9 August 1971, Prime Minister of Northern Ireland Brian Faulkner gave a speech in which he stated that the country was fighting terrorists that threatened the stability of the nation (his discourse bears some resemblance to the speech that Mexican president Felipe Calderón would give 35 years later, in order to justify the deployment of the armed forces). He proceeded to state:

The terrorists' campaign continues at an unacceptable level and I have had to conclude that the ordinary law cannot deal comprehensively or quickly enough with such ruthless violence.....I have therefore decided... to exercise where necessary the powers of detention and internment vested in me as Minister of Home Affairs.<sup>710</sup>

Faulkner's decision was not shared by all member of the British political class; 1<sup>st</sup> Viscount Whitelaw stated that he thought this decision had been rushed and not planned enough to target the persons who were truly responsible for the troubles.<sup>711</sup> An ongoing debate also took place during in House of Commons during the following months, as opinions were highly divided between members of the different ideological spectrums. It might have been understandable to visualize why the new strategy was controversial, if according to official records during January 1972–February 1972, 2,078 persons were arrested to be questioned and

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<sup>708</sup> *ibid* 126

<sup>709</sup> Home Office, *Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971* (Cmnd 4823, 1971).

<sup>710</sup> "1971: NI activates internment law" *BBC News* (London 9 August 2008) <[http://news.bbc.co.uk/onthisday/hi/dates/stories/august/9/newsid\\_4071000/4071849.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/august/9/newsid_4071000/4071849.stm)> accessed 2 January 2015

<sup>711</sup> RJ Spjut, "Internment and Detention Without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice" (1986) 49 *The Modern Law Review* 712, 715

subsequently charged, and from August 1971–February 1972, 2,447 persons were arrested and detained or in many cases, interned.<sup>712</sup> Between February and March of 1972, different groups of persons were interned, such numbers consisting of 108, 89, 89, 78, 85, 66, 104 and 76.<sup>713</sup> According to Spjut, the majority of persons detained were part of the IRA but various persons who had no connection to this group were also detained and interned.<sup>714</sup> The government was aware that detaining so many persons –innocent or not- was creating more turmoil among the population, so a decision to stop the large number of detentions was discussed and decided. As a result, representatives from the government stated that this would be done in a gradual way, explaining that the decision to practice internment would depend entirely on the level of threat that each individual case represented.<sup>715</sup> There were concerns from the most hard core Unionists, who established that the terrorists who were set free would commit crimes again; but as Spjut states, these fears had no real justification, as it was established that only the most radical and dangerous members of the IRA would be kept under bars, and that, as it has been established, the new deputy prime minister (Viscount Whitelaw) considered that the strategy had been rushed and not well prepared (as it was shown with the large numbers of persons who were detained and subsequently released, not before being subjected to the “five techniques”).<sup>716</sup> The way in which the arrests and subsequent time in detention were carried on was the subject of a sentence by the European Court of Human Rights in 1978, due to a complain of the Irish government against the UK, which is analysed below:

#### **5.10.1 Ireland v The United Kingdom Case (18 January 1978)**

The Court established that between August 1971 and June 1972 around 3,276 citizens were detained and processed in different centres, which were later replaced by police offices (in July 1972).<sup>717</sup> Specifically, the case of twelve citizens who were detained the 9<sup>th</sup> of August of 1971 and another two persons who were arrested in October 1971 were analysed<sup>718</sup>; these persons were subjected to the

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<sup>712</sup> HC Deb February 17 1972, vol. 831, col. 598

<sup>713</sup> HC Deb February 17 1972, vol 835, col 327

<sup>714</sup> RJ Spjut (n 711) 716

<sup>715</sup> HC Deb March 28 1972, vol. 831, col. 598

<sup>716</sup> RJ Spjut (n 711) 718-719

<sup>717</sup> *Ireland v The United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) [92]

<sup>718</sup> *ibid* [96]

infamous “five techniques” that have been previously discussed. The methods in question were: wall-stranding (which was described as “spread eagled against the wall, with their fingers put high above the head against the wall, their legs spread apart and their feet back, causing them to stand on their toes with the weight of the body mainly on the fingers”<sup>719</sup>; hooding (putting a bag over the person’s head); subjection to noise (subjecting the detainees to long periods of hissing loud sounds); deprivation of sleep; and deprivation of food and drink.<sup>720</sup> These techniques were never officially established but they were taught by word by the English Intelligence Centre.<sup>721</sup> Previous commissions had been established in order to analyse such practices, which had become known to the public shortly after their applications (The Parker Report published in March 1972 is the first example), but as the commission led by Whitman had established, the UK Government did not follow previous recommendations.

Also established were places where such treatment occurred: Palace Barracks, where 45 cases (then eight other cases were added) of ill-treatment were submitted to the Commission<sup>722</sup>; Girdwood park regional holding centre where 36 cases were submitted<sup>723</sup>; Ballykinler regional holding centre, where the applicant government provided evidence for 18 cases<sup>724</sup>; and various other places (referred as “miscellaneous places”), where a total of 121 cases were referred to the Commission.<sup>725</sup> The Court stated that between 31 March 1972 and 30 November 1974 a total of 1,078 accusations of assault from the armed forces were made to the Director of Public Prosecutions, had ordered to prosecute 86 of these cases by January 1975.<sup>726</sup> An relevant figure is the high number (compared to the status of those soldiers accused in Mexico), of armed personnel who had been tried in NI during the 70s, as the Court established that between April 1972 and January 1977,

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<sup>719</sup> *ibid*

<sup>720</sup> *ibid*

<sup>721</sup> *ibid* [97]

<sup>722</sup> *ibid* [108]-[109]

<sup>723</sup> *Ibid* [120]

<sup>724</sup> *ibid* [123]

<sup>725</sup> *Ireland v The United Kingdom* (n 717)[127]

<sup>726</sup> *ibid* [140]

218 security force members had been prosecuted, and 155 had been convicted.<sup>727</sup> In a strictly legal matter, the purpose of the applicant to bring all these facts to the ECtHR was “to ensure the observance in Northern Ireland of the engagements undertaken by the respondent Government as a High Contracting Party to the Convention and in particular of the engagements specifically set out by the applicant Government in the pleadings filed and the submissions made on their behalf and described in the evidence adduced before the Commission in the hearings before them”.<sup>728</sup> The applicant government alleged that the UK government had breached specifically articles 1, 3, 5, 6, and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also accused the UK of obstructing previous investigations.<sup>729</sup>

The Court established that the use of the “five techniques” were indeed considered as breaches of article 3, as they constituted inhuman and degrading treatment; but the majority of votes established that the use of such techniques did not constitute a practice of torture in any of the detention centres.<sup>730</sup> The reason not to consider this torture was that they caused mental and physical suffering, but not actual bodily injury. In addition to this, Judge Zekia established that in order for an action to be considered torture, the individual characteristics of each person have to be taken into account.<sup>731</sup> Regarding the derogations made as a consequence of the state of emergency, the Court established that even though they have acknowledged that extrajudicial detentions took place, they did not exceed what was considered as a requirement for the situation.<sup>732</sup> On the right to a fair trial established in article 6, the Court considered that such derogations were also in tune with the state of emergency established in article 14.<sup>733</sup> The UK Attorney General established that, upon considering the use of the “five techniques”,

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<sup>727</sup> *ibid*

<sup>728</sup> *ibid* [148]

<sup>729</sup> *ibid*

<sup>730</sup> *ibid* art 3-I

<sup>731</sup> *Ireland v The United Kingdom* (n 717) on art 3

<sup>732</sup> *ibid* on art 5-II

<sup>733</sup> *ibid* on art 6-III

the British government had established that they “will not in any circumstances be reintroduced as an aid to interrogation”.<sup>734</sup>

This is especially relevant, as the Irish government has requested the ECtHR to revise the case, as recent information held in the British public records office has been uncovered, which suggests that 12 men who were detained in 1971, were subjected to practices which had been considered as torture<sup>735</sup> since the moment of their arrest by international standards. The complainant based its case<sup>736</sup> on the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, citing articles 3, which explicitly prohibits torture; article 5, which grants the rights to liberty and security, both while on a state of freedom and on a state of detention; and article 6, which grants the rights to a fair trial. The judges’ decision established back then that there was not enough evidence to suggest that the practices used by the British army constituted acts or torture, and that the acts committed were legitimate, as a state of emergency permitted the derogation of certain human rights standards, as the British government had been informing the Secretary General of the Council of Europe of the measures been taken and had justified them correctly.<sup>737</sup> At the moment of this writing, it is uncertain if the ECHR will revise the case and change its previous judgement.

It is also pertinent to mention the subsequent civilian attempts to establish commissions dealing with human rights abuses. In 1992 a gathering of non-governmental associations gathered in order to discuss and analyse the state of human rights in Northern Ireland; the legal frameworks used as the base for the analysis were The Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. Legal academics and specialists from different continents were invited to discuss and analyse the situation in comparison with the treaties mentioned above, which Northern Ireland had signed (as an anecdote that highlights the severity of the security measures applied, one of the participants was arrested on its way to the

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<sup>734</sup> *Ireland v The United Kingdom* (n 717) para 102

<sup>735</sup> “State to apply to have “Hodded Men” judgement revised by ECHR” *RTE News* (Dublin 02 December 2014) <<http://www.rte.ie/news/2014/1202/664159-hooded-men/>> accessed 31 December 2014

<sup>736</sup> *Ireland v The United Kingdom* (n 717)

<sup>737</sup> *ibid*



assembly under the PTA provisions<sup>738</sup>). The report from the assembly is highly relevant to this part of the chapter, as it gave very straight-forward conclusions to the human rights crisis that the security strategy and the emergency legal provisions implemented side-effects caused.

In this report, Commissioner Lois Whitman focused in the concept of degrading and/or inhuman treatment, article 7 of the ICCPR, article 3 of the ECHR, and article 5 of the UDHR<sup>739</sup>; plus, the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment and Punishment was constructed purely with the goal of establishing defined provisions on the freedom against torture (the convention was adopted in 1984, and came into force in 1987; it obliged the State parties to adapt their domestic legislations in order to compel with customary international law). The importance of this convention resides in the fact that reports about the “five techniques” –described earlier in this chapter-, fit in the definition of torture established in the UNCT.<sup>740</sup> Whitman states that when a method of distinguishing the concept of torture from ill-treatment does not exist, certain factors need to be taken into account (as examples he mentions the age, health, and sex of a person, plus the particular circumstances in the way that each particular events took place).<sup>741</sup> The Assembly gathered evidence from different groups, non-governmental organisations, academics, lawyers, prisoners and ex-convicts in order to make an analysis of the recommendations needed.<sup>742</sup>

According to Caitriona Ruane, who was in charge of coordinating this commission, four categories of submissions that evidence violation of human rights in Northern Ireland were established: the abuses committed in the interrogations taken place in Strand Road, Gough Barracks, and Castlereagh; strip-searches;

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<sup>738</sup> Northern Ireland Human Rights Assembly, *Broken Covenants: Violations of International Law in Northern Ireland* (National Council for Civil Liberties, London 1993) 11

<sup>739</sup> *ibid* 66

<sup>740</sup> Article 1 (UNCT 1984): For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

<sup>741</sup> Northern Ireland Human Rights Assembly (n 738) 31

<sup>742</sup> *ibid*

degrading treatment of citizens while being imprisoned or in police custody; and ill-treatment and harassment in public places.<sup>743</sup> Ruane made an important observation: although the Assembly focused exclusively with the human rights violations committed by the British security forces and government officials, paramilitary groups were also committing abuses. She cites International Humanitarian Law and article 3 of the 1949 Geneva Convention as the main institution that needs to work on such situation.<sup>744</sup> This is especially relevant if the Mexican security strategy is to be approached with a comparison with Northern Ireland; as it has been specified previously in this thesis, Mexico gathers all the requirements needed for International Humanitarian Law to intervene. In the Northern Irish case, the IRA is to be considered a non-State actor, being a threat to both civilians and the government; and a similarity with the role of the Mexican drug-cartels can be drawn; this will be discussed in the conclusions.

The Commission lead by Whitman focused also on the allegations about ill-treatment; he stated that this had severe consequences as it was done with the purpose of causing “severe pain or suffering whether physical or mental”.<sup>745</sup> This behaviour went specifically against article 1 of the United Convention against Torture (UNCT), which defines the concept of torture. Whitman stated that previous recommendations had been made in centres of detention like Castlereagh, which had made the rate of allegations decrease; still, the commissioner established that the most important thing was to ensure that such treatments would completely cease and not be repeated.<sup>746</sup> As we have stated previously, the list of physical and psychological mistreatment is extensive, but the report also mentioned as examples of these the assault and blows to both genitals and ears, and extensive use of threatening, which sometimes went as far as becoming death threats.<sup>747</sup> This commission established three points in respect to the allegations of ill-treatment; the British Government had tried to counterattack the allegations by stating that these had been done by citizens who were suspects of terrorism. In this regard the commission established that the human rights of every person need to be guaranteed and respected regardless of the status of the accuser. In their own

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<sup>743</sup> *ibid* 32-33

<sup>744</sup> *ibid* 44

<sup>745</sup> *Ibid* 44-45

<sup>746</sup> *ibid* 45

<sup>747</sup> *ibid*

words, “torture and other forms of ill-treatment are never justifiable, no matter what a person is supposed to have done or is suspected of having done”.<sup>748</sup> In its second point the commission stated that ill-treatment and torture are more likely to be performed by officials when the detainees are isolated or *incommunicado* from any kind of witnesses or lawyers.<sup>749</sup> Finally, it was established that prestigious organisations such as Amnesty International had been stating the veracity of many allegations, and that the refusal from the UK Government to establish mechanisms that guarantee respect to human rights showed their lack of commitment to stop such practices.<sup>750</sup> The Ireland v The United Kingdom case certainly illustrated the lack of human rights safeguard during the period of detention.

#### 5.10.2 Post-internment measures

Eventually, the authorities replaced the figure of internment with another type of procedure, in which ministers had more emphasis.<sup>751</sup> An important legal figure established by the Emergency Powers Act was the Commissioner<sup>752</sup> (the Mexican government developed a similar figure which will be mentioned later in this chapter). As in other cases, a legal figure called Interim Custody Orders (ICO) was used, this figure allowed the authorities to keep a person detained for a period of 28 days; after following these steps the commissioner would decide if the person in question needed more detention time. If it was concluded that detention was necessary, the Commissioner would issue a Detention Order; in other case, the detained person would be set free. The Emergency Provisions Act 1973 was the legal ground for these new resolutions, but it still violated human rights principles, as Schedule I of the EPA stated that:

A person shall not be detained under an interim custody order for a period of more than twenty-eight days from the date of the order unless his case is referred by the Chief Constable to a commissioner for determination, and where a case is so referred the person concerned may be detained under the order only until his case is determined.<sup>753</sup>

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<sup>748</sup> *ibid*

<sup>749</sup> *ibid*

<sup>750</sup> *ibid*

<sup>751</sup> RJ Spjut (n 711) 719

<sup>752</sup> Emergency Provisions Act NI 1973, art 4(3)

<sup>753</sup> *ibid* (3)

The provision mentioned above does not set any limits for the time of detention of a determined person, which left a legal gap open that could be used to violate general principles, as the House of Commons discussed in 1972.<sup>754</sup> The government also used data from the number of releases of arrested people in order to gain political support, as official records said that almost 40 per cent of those detained were released.<sup>755</sup> These numbers were used to state that the commissioners had indeed exercised their powers with independence from the government, although, as Spjut states, the majority of detained persons continued to be Republicans.<sup>756</sup> There was an ongoing debate in this period regarding the use of the ICOs; even though it is not possible to confirm that such figure was being used as a substitute for internment, respected media like *The Economist* stated that:

The British authorities may come up with a system which would have some of the advantages of internment (holding men long enough for their friends to be suspicious of how much they may have given away) without having a Long Kesh to explain to Gerry Fitt's constituent.<sup>757</sup>

Finally, it must be stated that Human Rights Watch recommended the UK government to “have prompt and regular access to counsel of their choice and detainees should be allowed to have their lawyers present during interrogations”, to “be able to notify family members or friends immediately following arrest”, and also recommended that “All interrogations should be audio and video taped. Detainees' attorneys should have access to all audio and video tapes of interrogations”.<sup>758</sup>

### **5.11 The powers of stop and search, arrest and detention**

In order to set the context for this topic, it is relevant to state that the Prevention of Terrorism Act 1974 was created specifically to establish provisions that would enable both the civilian constabularies and Her Majesty's Forces to exercise special powers when they encountered terrorists or suspects of this crime. The Prevention of Terrorism Act was reformed in the years of 1976, 1984, and 1989 respectively; in the year 2000 the PTA was replaced by the Terrorism Act, which changed its focus from a regional approach on terrorism to a global one. The power

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<sup>754</sup> HC Deb 11 December 1972, vol 848 col 83

<sup>755</sup> HC Deb 17 April 1973, vol 855, col 280; HC Deb 29 March 1973, vol 853 col 1556

<sup>756</sup> RJ Spjut (n 711) 729

<sup>757</sup> “Ulster: the battle that is coming,” (*The Economist* no. 244, September 16 1972) 23-24

<sup>758</sup> Human Rights Watch, “To Serve Without Favour: Policing, Human Rights, and Accountability in Northern Ireland (*Human Rights Watch*, May 1997), <http://www.hrw.org/reports/1997/uk1/>, accessed 28/04/2015

to arrest and search without a warrant was given to the constables in section 7(1)(2) of the PTA 1974; in the PTA 1989, this power was established in section 14(1). Such provisions only allowed the security forces to make this type of arrest when a person was being found instigating, committing or preparing any act of terrorism, when a citizen was subjected to an exclusion order or when they were members to a proscribed organisation.<sup>759</sup>

The so-called powers of “stop and search”, and detention were granted in the Emergency Provisions Act of 1973 in its second part, specifically section 12 concerning the army, as it established the power of the soldiers to detain any person which they consider might have committed an offence for a maximum of four hours, regardless of the offence being scheduled or not. This principle would become one of the most consistent provisions across both the PTAs and the EPAs;<sup>760</sup> its main goal was to prevent terrorism and be able to identify possible suspects before they could commit any crime. Hillyard states that this measure was used to create a database which was big enough, and at the same time stigmatising the whole Catholic population as possible suspects.<sup>761</sup> While this last statement is impossible to verify, it can be inferred by the testimonies of the soldiers that Catholics were much more likely to be stopped (as opposed to Protestants, Catholics tend to wear crucifixes around their necks, which makes them easy to identify), searched and eventually arrested/harassed than the Protestant community. The level of surveillance was indeed high -similar to the protocols that modern security systems use to target suspects of terrorism-, and as Hillyard stated, “Each card contained information not only on the individual but on other family members and included religion, occupation, car details and lists of associates. These cards were cross-referenced to house cards and to a number of other card indices, including those for vehicle records”.<sup>762</sup>

This information contributed to create the database that the security forces were building in order to prevent future acts of terrorism. The numbers obtained

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<sup>759</sup> Prevention of Terrorism (Temporary Provisions) Act 1974 (NI), sect 7(1)(2)

<sup>760</sup> The Emergency Provisions Act continued to be amended, but its general structure was left intact until the Good Friday Agreement was signed. After this, most of its parts were repealed.

<sup>761</sup> P. Hillyard, “Political and Social Dimensions of Emergency Law in Northern Ireland” in A. Jennings (ed), *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (Pluto Press, London 1990) 194-195

<sup>762</sup> *ibid* 194

from the building of the database were highly secretive, as the same author established that the Catholic community was indeed affected by this strategy, because the government kept information about the number of persons stopped and searched away from the public spotlight and only after the Gardiner and the Baker reports surfaced, more information was made public.<sup>763</sup> Regarding the lack of information of the citizens being stopped and searched, it should be pointed that Commissioner (this commission is independent, as it was assisted by the *Fédération Internationale des Droits de l'Homme* and the International Helsinki Watch Committee) Professor Dader Asmal has recommended that the security officers to:

...should be required to keep a log of the date and time of every occasion on which a person is stopped or searched, the identity of the individual concerned, the length of time the person is detained and the reason for the stop/search. This log should be available for inspection in the case of any complaint. Unwarranted use of stop/ search powers should be made a disciplinary offence. Statistics should be published showing the number of people stopped or searched, analysed by religion, gender and outcome.<sup>764</sup>

The issue of lack of information from the army was not only addressed by the Northern Ireland Human Rights Assembly, but also by the Independent Commission on Policing for Northern Ireland, which were shocked to discover that there were no requirements needed in order to save the records for roadblocks, and stop and search activities, which made it impossible to investigate and make observations.<sup>765</sup> In order to get a scope of the level of harassment that a sector of the Northern Irish population suffered, it should be noted that Commissioner Lois Whitman's team found that various citizens made complaints of being stopped more than five or six times in the same day, either by members of the armed forces or the constabularies, with some cases of physical assault, threats and sexual harassment.<sup>766</sup>

These measures violated universal principles, such as article 13 of the UN Declaration of Human Rights (right to freedom of movement within the borders of a State), and also article 7 of the Civil and Political Rights Covenant, as the citizens were subjected to degrading treatment. The Police and Criminal Evidence (Northern

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<sup>763</sup> *ibid* 196

<sup>764</sup> Northern Ireland Human Rights Assembly (n 738) 68

<sup>765</sup> Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland* (Her Majesty's Stationery Office, Norwich 1999) [8.13]

<sup>766</sup> Northern Ireland Human Rights Assembly (n 738) 34

Ireland) Order 1989 gave the constables the power to arrest without a warrant anyone how would fall into a category established as “the reasons”.<sup>767</sup> In relation to the concept of degrading treatment, the United Nations Human Rights committee has established criteria which “recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners”.<sup>768</sup> The UN Committee also imposes an additional requirement on States when it is considered that article 7 has been violated as the Committee has established that “once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.”<sup>769</sup>

The importance of considering a citizen as suspicious of committing a crime was not based on any grounds when they were stopped in a public place; as Commissioner Professor Richard Falk stated in his investigation: “power to stop and compel answers can be exercised without any requirement of suspicion. In Northern Ireland people can therefore be stopped and questioned at random”<sup>770</sup>. This meant that everyone in the public spotlight could be a potential terrorist, or at least an accessory, as the main objective of these protocols was not only arresting citizens, but also finding ammunition. Professor Whitman also established that if a search implied the removal of clothes, a person of opposite sex should not be present at the time<sup>771</sup>, but this again contradicted the accusations of sexual harassment by part of the security forces.

Section 10 (EPA 1973), explicitly gave the security forces the power to arrest any person who they considered suspicious of terrorism, which included breaking into private properties of anyone suspected. By its part, section 16 (EPA 1973), gave both the army and the constables the exceptional power to stop and question anyone with the purpose of recollecting information about such person’s activities and identity, and also gather any information about third parties who might had

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<sup>767</sup> The Police and Criminal Evidence (Northern Ireland) Order 1989, 26(5)

<sup>768</sup> UNHRC “Views, Communication No 1813/2008” (19 May 2011) 101<sup>st</sup> session (2011) UN Doc CCPR/C/101/D/1813/2008 [7.3]

<sup>769</sup> *ibid* [9.5]

<sup>770</sup> Northern Ireland Human Rights Assembly (n 738) 119

<sup>771</sup> *ibid* 119

participated in actions involving terrorism. There was a penalty of £400 or even detention that refused to stop and/or give the information enquired. Even when compared to the EPA of 1996, the legislation had barely been modified, with the only difference being that the only penalty for refusing to follow the armed personnel's orders only contemplated a fine, but not detention (and the fact that the section's number changed to 25, not 16). It should be pointed out that legal holes existed in the EPA since its creation in 1973, as Greer stated that the kind of answers that the person question could give were not described in the Act, and forms of intimidation such as the soldiers taking photographs of the persons questioned were not considered illegal.<sup>772</sup>

Once again, this behaviour went against the aforementioned provisions from the Civil and Political Rights Covenant (articles 9 and 10); this situation also described the lack of well-established mechanisms of accountability and human rights training. Greer also described more legal holes in article 25 of the EPA 1996, which can also be attributed to article 16 of the EPA 1973, as fraction (a) establishes that one of the main purposes of the "stop" ability that armed personnel had, was to assert such person's identity. The author establishes that the concept of *identity* is not described in a clear way, and this might cause confusion where there are people in the same family with the same name; plus, the level of detail that such questions should carry is not well established either.<sup>773</sup> Although It can be concluded that no framework can establish the type of tasks that security forces can exercise in order to get the information required in an absolute manner, it can be established that such enquires should always follow basic human rights protocols and not infringe article 7 of the Civil and Political Rights Covenant.

Walsh's analysis of the main differences between the powers of arrest in "regular" institutional times and a state of emergency is that civilian security forces were forced to act in the limits of what the law established; with the issuing of special powers of arrest, these limitations disappeared.<sup>774</sup> Walsh's main contribution to this topic consisted in describing how the police crossed the line of separation of powers basic to any democratic State; he established that when the SPA (and later

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<sup>772</sup> S Greer, "Powers of the Army" in B. Dickson (ed), *Civil Liberties in Northern Ireland* (3<sup>rd</sup> edn, Committee on the Administration of Justice 1997) 51

<sup>773</sup> *ibid* 50-51

<sup>774</sup> CPJ Walsh, "Arrest and Interrogation" in A. Jennings (ed), *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (Pluto Press, London 1990) 30



the EPA) gave powers of questioning to the security forces, the line between the executive and the courts disappeared, as the questioning in order to gather evidence belonged in a trial. Secondly, Walsh stated that, being the security forces an extension of the executive power, they were acting as its representative. Using this logic, it can be said that judicial functions which belonged to the justice system, were given to the representatives of the executive.<sup>775</sup>

Although Welsh's theory can be contested by stating that both the civilian police and the army are institutionally part of the executive power, and therefore no legal provisions were broken, this theory illustrates one of the main debates concerning the boundaries between the grounds of State institutionalism and emergency regimes, when special powers are given. Walsh finished this topic expressing that "the corruption of the criminal justice process is therefore inherent in the structure and aims of the statutory special powers".<sup>776</sup> It seems excessive to state that corruption is an integral part of special provisions, but what cannot be denied is the difficulty of establishing special powers without damaging the free exercise of fundamental rights to some degree. While a state of emergency can be used with corrupt aims, one does not necessarily involve the other. If the soldiers' testimonies are taken into account, they seemed to view the British government as cold and indifferent, but they did not conceive their deployment as an act of corruption; regarding the soldiers themselves, they seemed to believe that they were truly doing a task with good intentions. A point in which most specialists do agree at a certain level, is that both the armed forces and the constabularies committed many acts of excessive force and incurred in severe violations (mainly due to the lack of training in human rights), which -as it has been in the case of Mexico-, was devastating and counterproductive for their image,<sup>777</sup> and legitimacy; and as a consequence, the animosity created among the civilian population grew with time.

Greer also established a relevant point here; the EPA 1996 (this legal issue continued from the conception of the first EPA in 1973), stated that any person could be arrested for an unspecified offence, regardless if it is considered a terrorist offence or not. The author only points out that the EPA (from its first incarnation),

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<sup>775</sup> *ibid* 30-31

<sup>776</sup> *ibid* 31

<sup>777</sup> *ibid* 31

stated that the soldiers had to make a clear statement establishing they were acting as members of Her Majesty's Forces.<sup>778</sup> This did not change the fact that there were a high number of complaints against the constabularies for harassing during the public stop-and-search operations. The problem resided in the fact that the army did not have many restrictions in terms of making a decision for considering which behaviour represented an offence.

The power of armed personnel and constabularies to search premises or even a private home to verify if communication devices and ammunition are located is established in section 13 of the EPA 1973, and section 20 of the EPA 1996. Since it includes public places,<sup>779</sup> the EPA 1996 established the concept of public place as "a place to which for the time being members of the public have or are permitted to have access, whether on payment or otherwise"<sup>780</sup>. This is relevant in order to evaluate the high level of control that the security forces had over the population, as such section indicated that the concept of privacy drastically changes during the time in which an emergency is declared. It is also important to point out that the EPA established legal provisions in order for military personnel to enter a private home (section 26(1)). This legal authorisation needed to come from the Secretary of State, or if the entrance to such place was an urgent matter that could jeopardize peace in case of not being performed then such authorisation would not be required.

Professor Whitman concluded that the powers of stop and search were in fact prone to be abused. He stated that the main problem when it comes to searching in public places was the harassment of random citizens when the security forces had no grounds for suspicion.<sup>781</sup> There is a description of this concept contained in the Police and Criminal Evidence Act (UK) 1984, which establishes the following (although this act refers exclusively to civilian security forces, it is relevant in order to judge the protocols of both soldiers and constabularies in Northern Ireland):

Reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts,

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<sup>778</sup> S. Greer (n 772) 55

<sup>779</sup> *ibid* 51

<sup>780</sup> Emergency Provisions Act (NI) 1996, sect 58

<sup>781</sup> Northern Ireland Human Rights Assembly (n 738) 125

information, and/ or intelligence which are relevant to the likelihood of finding an article of a certain kind or, in the case of searches under section 43 of the Terrorism Act 2000, to the likelihood that the person is a terrorist. Reasonable suspicion can never be supported on the basis of personal factors.<sup>782</sup>

At a domestic level, the Court of Appeal of Northern Ireland established in the *McKee v Chief Constable for Northern Ireland* case that:

...the definitions of "terrorism" and "terrorist" in section 31(1) of the Northern Ireland (Emergency Provisions) Act 1978 were wide, and that on the true construction of section 11(1) of the Act of 1978 the suspicion there referred to related to the state of mind of the arresting officer and no one else, and that that state of mind could legitimately be derived from the instructions given to the arresting officer by his superior officer; that the arresting officer was not bound, and indeed might well not be entitled, to question those instructions or to enquire upon what information they were founded...<sup>783</sup>

These factors are to be considered circumstantial evidence in most cases, and it can lead up to find reasonable grounds for suspicion, such as the Northern Ireland Court of Appeal stated in *McClean and McCreary v The Queen*:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but this is not so, for then, if any one link break, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a reasonable suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of."<sup>784</sup>

In the specific case of citizens who were arrested for the suspicion of terrorist activities, the Review of the Operation of the Northern Ireland Emergency Provisions Act 1978 comes to reference; published in 1984 and known as the Baker Report. It refers to the subject of suspicion or reasonable suspicion:

Only a lawyer or a legislator would suspect (or reasonably suspect?), a difference. But there is one because, say the judges, with whom I agree, Parliament by using the two phrases must have so intended. The test for Section 11 (of the EPA 1978), is a subjective one: did the arrestor suspect? If his suspicion is an honest genuine suspicion that the person being arrested is a terrorist, a court cannot enquire further into the exercise of the power. But where the requirement is reasonable suspicion it is for the court to judge the reasonableness of the suspicion. It is an objective standard. The facts which

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<sup>782</sup> Police and Criminal Evidence Act 1984, s 2.2

<sup>783</sup> *McKee v Chief Constable* [1984] 1 WLR 1358

<sup>784</sup> *McClean and McCreary v The Queen* [2009] NICA 32 [5]

raise the suspicion may be looked at by the court to see if they are capable of constituting reasonable cause. Reasonable suspicion is itself a lower standard than evidence necessary to prove a *prima facie* case. Hearsay may justify reasonable suspicion but may be insufficient for a charge.<sup>785</sup>

Stating that reasonable suspicion must be based on an objective standard was used by the ECHR in the *Fox, Campbell and Hartley v The United Kingdom* case<sup>786</sup>, as the Court established that what was considered as “reasonable” depended in the particular circumstances of the crime being tried, and terrorism fell into a different category than other crimes because of the high danger and risk involving human lives: For that reason, “reasonableness” could not be “stretched” to the point of impairing the essence of article 5.1 of the European Convention of Human Rights (Right to liberty and security), at the time of making an arrest.<sup>787</sup>

The Emergency Provisions Act 1973 also makes a direct reference to the term “intention” in its paragraph 3 of article 11, when it establishes that security forces have the power of seizing any object that they suspect “is being, has been or is *intended* to be used in the commission of a scheduled offence or an offence under this act which is not a scheduled offence.”<sup>788</sup> The Act does not address to what extent can an act or behaviour be considered an intention, and at best leaves such term open to various interpretations.

It is pertinent to discuss and analyse the use of force in the Northern Irish conflict, but in order to understand an essential part of the emergency regime a description of the strategy used for submitting all citizens accused of terrorism to a juryless trial needs to be pointed out.

## **5.12 The Diplock Courts**

According to specialists as Jackson and Doran, the Diplock courts were another institution created by the emergency system.<sup>789</sup> After the tragic events of *Bloody Sunday*, the Parliament presented the Secretary of State of NI with the Diplock Report (named after its chairman, Lord Diplock). The goal of such report

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<sup>785</sup> *Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978* (Cmnd. 9222, 1984) (Baker Report) [280]

<sup>786</sup> 12244/86, 12245/86, (1990) 13 EHRR 157, [1990] ECHR 18, 12383/86

<sup>787</sup> 12244/86, 12245/86, (1990) 13 EHRR 157, [1990] ECHR 18, 12383/86 [30], [31], [32]

<sup>788</sup> Emergency Provisions Act (NI) 1973, art 11 [3]

<sup>789</sup> J Jackson, S Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (Clarendon Press, Oxford 1995) 287

was to make legal amendments and create new institutional paths in order to “deal with terrorist activities”<sup>790</sup> in the Northern Irish territory. Among the conclusions, the necessity of prolonging the state of emergency as long it was needed was established.<sup>791</sup> The commission expressed that there was a lack of testimonies and the citizens did not press charges due to fear and intimidation of the families and witnesses by the terrorists.<sup>792</sup> Therefore, in order to protect the population which by the principles of Common Law needed to serve as jury, the commission established that scheduled offences (which were referred in the report as acts of terrorism) should be tried by a Judge member of a County Court, or a member of the High Court; this trial would be conducted with no members of the jury, just the judge on its own.<sup>793</sup> The use of public funds to keep the special courts running became a waste of budget: in 1986 only 34 persons were tried by these courts, but such measures became normalised as they had become part of the regular justice system in Northern Ireland by the 1980s.<sup>794</sup>

The Diplock Courts continued to work until a group of Members of Parliament saw the need to reform this institution in order to take a step towards normalising the Northern Irish institutional system in 2005. A consultation paper called *Replacement Arrangements for the Diplock Court System* was issued by the Northern Ireland Office in 2007. The consultants established that “some form of non-jury trial will be necessary for Northern Ireland for exceptional cases where there are likely to be paramilitary or community-based pressures on a jury”<sup>795</sup>, but in general they stated that the Diplock courts should be abolished. The Justice and Security (Northern Ireland) Act 2007 indicated the reforms on its Schedule 1(1) (2) (3) (4), which basically stated that only under certain conditions and where the course of the trial and the security of the jurors was jeopardised, the Director of Public Prosecutions for Northern Ireland can issue a certificate in order to establish the

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<sup>790</sup> Home Office, *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (Cmnd 5185, 1972)

<sup>791</sup> *ibid* [6]

<sup>792</sup> Home Office (n 765) [6(a)(b)(c)]

<sup>793</sup> Home Office (n 765) [6(f)(g)]

<sup>794</sup> G Hogan, C Walker, *Political Violence and the Law in Ireland* (Manchester University Press, Manchester 1989) 238-239

<sup>795</sup> *Replacement Arrangements for the Diplock Court System* (Northern Ireland Office 2007), [4.1]

procedure of a trial without a jury.<sup>796</sup> The existence of the Diplock Courts for more than 30 years is essential to understand the number of complaints for unfair trials during the times of the troubles.

According to Jackson and Doran, various judges expressed their desire for the Diplock trials to be kept to a minimum, as they thought that the traditional umpireal or contest mode of the Anglo-Saxon system was better than the accusatory system of the special courts.<sup>797</sup> The degree of intervention from the judges did not vary from the jury courts to the special courts, although most judges found that the special trials required them to be more inquisitive in some parts, such as the questioning of the defence witnesses.<sup>798</sup> One of the main conclusions that Jackson and Doran made was that, contrary to the common thought, the judges did not adopt a behaviour that would result in an increase of conviction rates or guilty pleas.<sup>799</sup> The authors expressed the fact that in all cases the accused was facing what they call an “adversarial deficit” in two aspects: the first one is that the judge took a deeply extended range of view of the case, which according to Jackson and Doran should not be allowed. The second aspect is that a professional trier always had a bigger influence over the course of a case than lay triers (jury), and it was easier for a professional trier to get inside information on a case than it is for lay triers.<sup>800</sup> The authors concluded stating there was the need to establish a mechanism to counter the judge’s conclusions before the judgement was pronounced.<sup>801</sup> As it can be seen, the fact that the existence of lay triers is always a better way to balance the interests of all parties involved should be addressed.

As time passed by, it became more common to use the Diplock courts for crimes which did not fall in the description of terrorism, as in 1987 -as the EPA went through various reforms, and search and seizure provisions took a more defined role-,<sup>802</sup> such provisions became normalised because the State did not consider various emergency provisions as temporary anymore. The author also mentioned

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<sup>796</sup> Justice and Security Act 2007, s. 1(2)(a)(b)

<sup>797</sup> J Jackson, S Doran (n 789) 289

<sup>798</sup> *ibid* 290

<sup>799</sup> *ibid* 292

<sup>800</sup> *ibid* 293-295

<sup>801</sup> *ibid* 297

<sup>802</sup> P Hillyard (n 761) 197

*robbery* as an example of a crime for which various citizens went through the Diplock Courts, even though this was not a scheduled offence.<sup>803</sup> The consequences of being tried by these special courts have been mentioned earlier in this chapter, but in the report made by the commission led by Lois Whitman and presented to the Northern Ireland Human Rights Assembly in 1992, various factors which affected the right to a fair trial were established. Among such factors were the lower standards for admitting evidence compared to the ordinary courts; the fact that the obligation to submit evidence relied on the defendant instead of the prosecutor; and everything said while uncommunicated also had a bigger impact on the Diplock Courts.<sup>804</sup> Even though the state of emergency legitimised several derogations to the covenants and treaties signed by NI, it was clear that the use of such extreme measures had to be applied to crimes that also had an extreme nature. The prosecution in special courts of persons accused of minor crimes breached the legality of article 15 of the European Convention on Human Rights which states that emergency measures must be taken to “the extent strictly required by the exigencies of the situation”.<sup>805</sup> It can be concluded that the trials of juryless courts for minor crimes breached both the right to a fair trial and the principles of proportionality between the emergency provisions and the crime committed.

### 5.13 Use of force

The Criminal Law Act (Northern Ireland) 1967 conceptualised the use of force in Northern Ireland. In its section 3(1) the act allowed a *person* (implying that any citizen had this right) to use force as long as it was “reasonable in the circumstances in the prevention of crime”, or to aid in a lawful arrest.<sup>806</sup> The EPA 1973 also granted the constabularies with the ability to use “reasonable” force in order to take data of an arrested person such as fingerprints or photographs.<sup>807</sup> When it came to entering places, vehicles, vessels, etc., the security forces were able to use force if needed; this was found in section 18(2) of the EPA 1973, and section 28(4) of the EPA 1996.

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<sup>803</sup> *ibid* 199-200

<sup>804</sup> Northern Ireland Human Rights Assembly (n 738) 46

<sup>805</sup> Article 15.1 (European Convention on Human Rights 2010) This article has been put in challenge in the ECHR before. For more references look in *Lawless v Ireland*, *Brannigan and McBride v The United Kingdom*.

<sup>806</sup> Criminal Law Act (NI) 1967, sect 3(1)

<sup>807</sup> Emergency Provisions Act (NI) 1973, sect 10(4)

Professor Kader Asmal, member of the commissioners of the Northern Ireland Human Rights Assembly 1992 started his analysis explaining that the Right to Life was the first essential provision that had been violated several times while employing State force.<sup>808</sup> Although such right is established in all contemporary treaties and covenants, Asmal bases his argument in articles 6.1 of the ICCPR and article 2 of the ECHR, which states the right of every citizen to have his life guaranteed and protected by law. At the moment of the analysis made by the assembly, the Criminal Law Act 1967 was still active and Asmal stated that the use of force allowed for the security forces entered in conflict with the right to life, as:

Some of the dicta which have come from the courts of Northern Ireland on the use of lethal force are extraordinary. Judges have drawn parallels with a Wild West posse, implying that the correct standard for the security forces to adopt is the bringing back of a target dead or alive. In another case the judges referred to victims being 'sent to the final court of justice'. Such attitudes on the part of the courts do not assist in maintaining respect for the right to life.<sup>809</sup>

The shoot-to-kill policy was a recurrent topic in which the concept of use of force was analysed, as it constituted the most extreme use of a legal provision in order to justify the security of the Northern Irish population in general. Finally, in his recommendation to the State Asmal established that the concept of "reasonable force" should be changed by a new one based on the use of "minimum force which is no more than is absolutely necessary".<sup>810</sup> The change in adjectives might not seem as important at first sight, but when the State guarantees a minimum of force it is also obliged to take the needed measures to avoid using any kind of force, which was the rationale behind the judgment of the majority in the *McCann and Others v the United Kingdom* case.

The concept of what was considered *reasonable* was also a subject of debate among judges, especially when it came to dealing with suspected members of the IRA. It is important to refer the *McCann and others v The United Kingdom* case, as the ECHR stated that the decision to use lethal force needs:

The relevant domestic case-law establishes that the reasonableness of the use of force has to be decided on the basis of the facts which the user of the force honestly believed to exist: this involves the subjective test as to what the user believed and an objective test as to whether he had reasonable grounds for that belief. Given that honest and reasonable belief, it must then be

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<sup>808</sup> Northern Ireland Human Rights Assembly (n 738) 13

<sup>809</sup> *ibid* 13-14

<sup>810</sup> *ibid*



determined whether it was reasonable to use the force in question in the prevention of crime or to effect an arrest.<sup>811</sup>

Also, at a domestic level, the Belfast Crown Court established in the *Martin Raymond Jude Murray, Liam Patrick Kevin Murray, Kevin Michael Charles Toye, William McDonagh & Kevin Murray v The Queen*, that a person is entitled to use reasonable force when two circumstances (which are subjective and objective respectively), are met:

(I) a genuine belief in facts which if true would justify self-defence is a defence to a crime of personal violence because the belief negatives the intent to act unlawfully.

(II) An objective test is required in respect of the degree of force used. The degree of force used by an accused may not be regarded as reasonable if he uses excessive force or has over-reacted. Of course a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.<sup>812</sup>

The Court must decide whether the defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. The defendant must be judged in accordance with his honest belief, even though that belief may be mistaken.

These principles have been reflected by the Council of Europe, as they have established that “For the purpose of performing their duties, the law provides the police with coercive powers and the police may use reasonable force when lawfully exercising their powers.”<sup>813</sup> The Commissioner was clear when addressing the limits of enforcement, as he also stated that “There may be no attempt to conceal, excuse or justify the unlawful exercise of coercive or intrusive powers by a police officer by reference to his or her lawful recourse to coercive and intrusive powers”.<sup>814</sup>

Greer established that, although the use of force in an excessive manner by the security bodies could be subjected to prosecution, there was reluctance from the security system to try them, and when they did, the existence of the Diplock courts

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<sup>811</sup> *McCann and Others v The United Kingdom* App no 18984/91 (ECtHR, 27 September 1995) [133]

<sup>812</sup> *Martin Raymond Jude Murray, Liam Patrick Kevin Murray, Kevin Michael Charles Toye, William McDonagh & Kevin Murray v The Queen* [2011] NICC 18 [61]

<sup>813</sup> Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, (12 March 2008) CommDH(2009)4, [16]

<sup>814</sup> *ibid* [18]

made the judgements the subject of controversy.<sup>815</sup> According to this author the great majority of the cases where an accusation of excessive use of force existed, the courts would justify it under the state of emergency that the country had established.<sup>816</sup> Jennings explains that before The Criminal Law Act (Northern Ireland) 1967, a precedent which gave the constabularies and soldiers the option to use lethal force did not exist.<sup>817</sup> The only way to use force in order to kill a citizen before the Act was: 1) when it is absolutely necessarily in order to stop a crime; 2) when the consequence of not killing the potential criminal would have been more severe than the death of the criminal itself.<sup>818</sup> These would be the only two circumstances in which the murder of a civilian be justified enough to stand up for a case in court. This pre-1967 position on the use of force is mentioned in order to establish the correlation of a stronger enforcement with that the government viewed as an emergency situation, which the courts subsequently justified.

#### **5.13.1 “Shoot-to-kill” unofficial policy**

Even though such strategy did never carry that name in an official policy, the provisions established (Criminal Law Act of 1967 in its section 3(1)) created legal gaps which specialists considered as the ground for the murder of citizens that in many cases were not even carrying weapons. In 1985 an inquiry report issued by a group of international lawyers established that:

The evidence we have heard leads us to conclude that an administrative practice has been allowed to develop in Northern Ireland, by which killings in violation of the European Convention and the International Covenant are at least tolerated, if not actually encouraged. Undercover units of the British Army and the RUC are trained to shoot-to-kill even where killing is not legally justifiable and where alternative tactics could and should be used. Such administrative practices are illegal in domestic and international law. They should be stopped and training for them should be discontinued immediately.<sup>819</sup>

This policy had been highly subjected to scrutiny after the Good Friday agreement in order to establish commissions of truth that would make justice to the

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<sup>815</sup> S. Greer (n 772) 58

<sup>816</sup> *ibid* 58

<sup>817</sup> A Jennings, “Shoot to Kill: The Final Courts of Justice” in A. Jennings (ed), *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (Pluto Press, London 1990) 107

<sup>818</sup> J Smith, B Hogan, *Criminal Law* (5<sup>th</sup> edn Butterworths, London 1983) 325

<sup>819</sup> K Asmal, *Shoot to Kill? International Lawyers’ Inquiry into the Lethal Use of Firearms by the Security Forces in Northern Ireland* (Mercier Press, Dublin 1985) 134

families of the citizens who were unlawfully killed. The Historical Enquires Team (a unit specialised in investigating the unsolved murders during the Troubles between the years of 1968-1998), carried on various investigations on the alleged shoot-to-kill policy. A clear example is the case of W. Francis McGreanery, who has been killed by a member of the armed forces in Derry in 1971. The Historical Enquires Team (HET) worked on the case not to resolve if McGreanery had been killed by a member of the armed forces –as this had been established-, but in order to establish his intention and proving whether he had a firearm or not.<sup>820</sup> The HET concluded stating that the soldiers were right in believing there was a real threat, as hours before the incident another soldier had been murdered.<sup>821</sup>

The enquiry team addressed that the witnesses stated that McGreanery was unarmed, but the HET also established that the soldier who shot him accepted his mistake, stating that he actually believed that the victim had a rifle. In conclusion, the enquiry team established that he was not carrying any arms, and therefore he did not represent a threat that would justify the soldier's action.<sup>822</sup> The Aidan Mc Anespie case is also relevant, as he was fatally shot by a member of the British army, who established in his statement that he was manipulating the machine gun with his wet fingers and this caused them to slip and action the trigger, firing three shots, one of which hit Mc Anespie in the back, killing him.<sup>823</sup> The HET carried an investigation and concluded that the soldier's version "could be considered to be the least likely".<sup>824</sup> The HET main goal in this investigation was not to uncover the full truth, which was very unlikely to be established, but it was the best way to give some peace to Aidan's family, who always contradicted the official version.

A consequence that the indefinite deployment of the armed forces -in terms of giving the security bodies the power of using lethal force when they consider it necessary- is the fact that corruption can arise, as the Stevens Enquiry concluded. This report was created with the aim of clarifying past cases where people had been

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<sup>820</sup> Historical Enquires Team, "McGreanery case review summary report" (*Pat Finucane Centre*) 6 <<http://www.patfinucanecentre.org/cases/mcgreanery.pdf>> accessed 29 May 2015

<sup>821</sup> *ibid* [47]

<sup>822</sup> *Ibid* [48] – [49]

<sup>823</sup> "Press statement issued on behalf of the family of Aidan Mc Anespie" (*University of Ulster*) <[http://cain.ulst.ac.uk/victims/docs/group/pat\\_finucane\\_centre/pfc\\_mcanespie\\_240608.pdf](http://cain.ulst.ac.uk/victims/docs/group/pat_finucane_centre/pfc_mcanespie_240608.pdf)> accessed 25 May 2015

<sup>824</sup> *ibid*

killed or wounded by security agents; the report also explained how the authorities obstructed the investigations.<sup>825</sup> Such document stated that there was “collusion between the loyalist paramilitaries, the RUC and Army”.<sup>826</sup> The Enquiry referred to the Patrick Finucane (a solicitor from Belfast) murder, which had been previously covered in detail by the Report of the Patrick Finucane Review elaborated by the Rt Hon Sir Desmond de Silva. Both the Desmond de Silva and the Stevens reports analysed the role which the Armed Forces played in Finucane’s murder, which had hired an officer called Brian Nelson who was involved in his and others’ murders; it was established that various senior Army officers knew about Nelson’s activities.<sup>827</sup> The Stevens report concluded that there had been a lack of accountability from those investigating the murders of Finucane and Lambert, as there were many records not available, there was evidence withheld, and the spread of intelligence was not up to the required standards.<sup>828</sup> Among the recommendations made by the report to the Police Service of Northern Ireland (PSNI) were the following: to introduce the National Intelligence Model; to establish a model for investigating terrorism with the help of an Assistant Chief Constable; an internal investigation department that would deal with allegations of corruption and collusion; and an independent audit of the recommendations dealing with the armed forces.<sup>829</sup>

By its part, Jennings has established that this policy has been used in two different ways, as he describes:

The first is what can be termed the habitual and excessive use of force by ordinary members of the security forces, the most common example of which is teenagers being shot and killed whilst joy raiding and failing to stop at roadblocks. The second category involves the use of special anti-terrorist squads employed to stake out and kill suspected terrorists.<sup>830</sup>

It is important to establish that the European Court of Human Rights pronounced itself on an emblematic case which was centred on the shoot-to-kill policy. In 1992 Pearse Jordan was killed by a firearm used by the RUC after a car

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<sup>825</sup> SJ Stevens (n 689) [1.3]-[1.4]

<sup>826</sup> *ibid* [2.15]

<sup>827</sup> D de Silva, *The Report of the Patrick Finucane Review* (HC 2012-12, 802-1) [8.123]-[8.125]

<sup>828</sup> S.J. Stevens (n 689) [4.7-4.9]

<sup>829</sup> *ibid* [17-19]

<sup>830</sup> A Jennings (n 817) 104

chase; at the moment of the shooting Jordan was unarmed.<sup>831</sup> At a domestic level, the relevant provision used was section 3 of the Criminal Law Act 1967, which legitimises the use of lethal force in certain circumstances.<sup>832</sup> At an international level the most relevant framework to this case was paragraph 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>833</sup> The applicant stated that his son had been murdered as part of the shoot-to-kill policy that the UK government carried on in Northern Ireland, and he established that, based on reports made by human rights watch and enquires such as the Stalker investigation, there had been various cases where suspects were killed instead of being arrested as part of the security practices.<sup>834</sup>

The court established that the rationale behind the use of lethal force on “absolutely necessary” situations mean that “a stricter and more complete test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society””.<sup>835</sup> The court concluded that there was no doubt that the deceased had been unarmed at the moment of the shooting.<sup>836</sup> It must be added that the police had not carried out a truly independent investigation, and that the proceedings in general had not been carried in a deliberate way.<sup>837</sup> They declared that article 2 of the Convention on Human Rights had been violated “in respect of failings in the investigative procedures concerning the death of Pearse Jordan”.<sup>838</sup>

### **5.13.2 The McCann and Others v The United Kingdom case study**

An emblematic case that is essential to mention and analyse in order to understand the scope of the alleged shoot-to-kill policy, is the McCann and Others v The United Kingdom (18984/91). On the 4<sup>th</sup> of March of 1988, members of the Special Air Service forces (SAS), arrived to Gibraltar under the assumption that a terrorist attack was being planned by the IRA, on the 8<sup>th</sup> of March 1988 in the British

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<sup>831</sup> *Hugh Jordan v The United Kingdom* App no 24746/94 (ECtHR, 4 May 2001) [12]-[13]

<sup>832</sup> *ibid* [59]

<sup>833</sup> *ibid* [87]-[88]

<sup>834</sup> *ibid* [95]

<sup>835</sup> *ibid* [104]

<sup>836</sup> *ibid* [1010]

<sup>837</sup> *ibid* [1042]

<sup>838</sup> *ibid* decision 1

peninsula of Gibraltar. As it was stated in the trial, the main aim of the operation was “to protect life; to foil the attempt; to arrest the offenders; the securing and safe custody of the prisoners”.<sup>839</sup> According to the Commissioners operational order, the SAS personnel were to base their operation in “police surveillance and having sufficient personnel suitably equipped to deal with any contingency. It was also stated that the suspects were to be arrested by using minimum force, that they were to be disarmed, and that evidence was to be gathered for a court trial.”<sup>840</sup> One of the main arguments of the soldiers in order to justify the use of force resided in the fact that they had been advised of the existence of a “button job”, which consisted in a radio-controlled device that would detonate an explosive.<sup>841</sup>

A statement which can be referred to the discussion of what is considered as reasonable and what is considered as a mere assumption, was the fact that the soldiers stated that the suspects would detonate the explosive if they were confronted, in order to achieve media success.<sup>842</sup> Even though the suspects had a record of previous acts of terrorism, the assumption of giving a situation for granted based a potential ideological triumph on the media is not sustainable enough. The fact that the soldiers could not give concrete information about the supposed radio detonator, constituted another indicator of the lack of consistency in the defence’s argument.

One of the soldiers stated that there were different changes to the plan, and they had opted for disarming the suspects and try to defuse the bomb.<sup>843</sup> According to the testimonies, the soldiers started following two persons (that later met with a third person), all of whom were identified with an 80% of accuracy.<sup>844</sup> The soldiers then proceeded to inspect a car which one of the suspects had left parked near the place where the event was supposed to take place, and according to his testimony, they decided not to arrest them, but to go and examine the car left on the spot. The soldiers state that they concluded it was a “suspect car bomb”, because its aerial looked old and out of place with the model of the car, which looked “newish”, while

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<sup>839</sup> *McCann and Others v The United Kingdom* (n 811) [15], [17]

<sup>840</sup> *ibid* [18]

<sup>841</sup> *ibid* [26]

<sup>842</sup> *ibid* [28]

<sup>843</sup> *ibid* [37]

<sup>844</sup> *ibid* [45]-[47]

they stated that from the examination he could confirm that “they were dealing with a car bomb”. Another soldier also stated that he “believed 100 per cent that there was a bomb in the debussing area, that the suspects had remote-control devices and were probably armed”.<sup>845</sup> After receiving the report of both the activities of the suspects and the examination of the referred vehicle, their Commissioner took the decision to have them arrested. In the signed form to perform such operation he explicitly stated to his subordinates “that you proceed with the military option which may include the use of lethal force for the preservation of life”.<sup>846</sup> One point that illustrates the lack of experience of the soldiers dealing with civilians is the fact that they had to be trained by the police on the procedures to arrest a person. During the training they were taught to approach the citizens with their weapons uncovered and say “Stop. Police; hands up”<sup>847</sup> (this is textually what the soldiers’ testimony stated, which implies the fact that they were not identifying properly, as they were not members of the constabularies, but of Her Majesty’s forces, which violated section 12(2) of the EPA).

One of the soldiers testified that as he was approaching McCann to make the arrest, this one made a sudden movement which the soldier interpreted as a potential threat, as he thought that he might activate the explosive, and he and another soldier shot him in the back (even though as he stated, the suspect was not farther than three metres away from him<sup>848</sup>). The armed personnel then established that when Farrell saw this she made an attempt to grab her bag (they also thought that she might tried to activate the bomb), so the second soldier fired her until she was lying on the ground; one of the soldiers expressed that he killed McCann in order to “stop him becoming a threat and detonating his bomb”.<sup>849</sup> Meanwhile, Savage was being approached by two other soldiers, and according to their testimonies, when they heard the gun shots being shot at a nearby point (where his previous companions were getting shot) he reached out for his hip area (in his right side), and one of the soldiers shot him a total of 9 times.<sup>850</sup> One of the militaries established that the intention was to kill him because that was the training they had

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<sup>845</sup> *ibid* [48-][53]

<sup>846</sup> *ibid* [54]

<sup>847</sup> *ibid* [55]

<sup>848</sup> *ibid* [61]

<sup>849</sup> *ibid* [62]-[63]

<sup>850</sup> *ibid* [78]

received.<sup>851</sup> The attack commander also confirmed this, as he stated that this was the standard procedure for any soldier who opened fire.<sup>852</sup>

After these events, the security forces searched the bodies of the three bodies and Farrell's handbag. They did not find any detonators or arms,<sup>853</sup> although, they did find a pair of keys with a registration number in the handbag. This number was used to locate a car where the Spanish police found another pair of keys belonging to another car that indeed contained an explosive device.<sup>854</sup> During the investigation of the murders the representative of the applicants made questions and inquired the theory of the UK government giving the order to shoot the suspects beforehand; all of the soldiers involved (including the commander) denied that such orders had been given with anticipation.<sup>855</sup> After hearing the testimonies from the soldiers and the coroner, the jury's verdict was *lawfull killing* and the applicants started actions in the High Court of Justice in Northern Ireland against the Ministry of Defence.<sup>856</sup>

It is relevant for the legal scope of the case to establish that the Commissioner of Police had annexed a document -along with the details of the operation-, called "Firearms - rules of engagement", which contained the main points in order to fire a gun, and also another guide for police officers titled "Firearms: Use by Police" was attached. At an international level the Court based the use of firearms mainly under article 9 of UN Force and Firearms Principals.<sup>857</sup> In the topic of the use of lethal force by members of the State, the court established that paragraph 2 of article 2 of the Convention does not concern only with intentional killing, but the real intention behind such paragraph is to describe when the use of force, "which may result, as an unintended outcome, in the deprivation of life".<sup>858</sup>

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<sup>851</sup> *ibid* [79]

<sup>852</sup> *ibid* [80]

<sup>853</sup> *ibid* [93]

<sup>854</sup> *ibid* [98]-[99]

<sup>855</sup> *ibid* [118]-[119]

<sup>856</sup> *ibid* [121]-[122]

<sup>857</sup> *ibid* [136]-[137] Article 9 of the UN Force and Firearms states that: "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

<sup>858</sup> *ibid* [148]



Among the arguments that the applicants submitted was the statement that the murders had been the result of the incompetence of the anti-terrorist operation, which did not respect the right to life of the deceased. They also pleaded for the court to examine the possible liability of the UK government, as the behaviour of the soldiers might have been a consequence of false information received.<sup>859</sup> By its part, the UK government justified the soldiers' actions stating that these were absolutely necessary in order to prevent a large number of casualties, as they stated that the fast movement in the suspects arms when they were confronted with the soldiers gave a reasonable suspicion to think that they were trying to activate the explosive, a fact that was corroborated by witnesses.<sup>860</sup> They also established that the background they had of the suspects and the previous activities of the IRA gave them enough information to consider the persons killed as a threat to the Gibraltar society.<sup>861</sup> The Commission established that this concern for the lives of the people in Gibraltar was reasonable enough to shoot the suspects as prevention for unlawful violence. The fact that there was enough of a possibility for the suspects to activate a bomb was also taken into account by the commission as a sign that the use of lethal force was justified.<sup>862</sup>

Finally, the court's assessment established that the military was in a very delicate situation as they had to protect the civilian population, but they also had to follow the protocols for the use of force established in the law. They also stated that it was impossible for the armed forces to have full information on the suspects' plans and motivations.<sup>863</sup> The Court also addressed that the soldiers had acted in good faith, truly believing that the suspects carried weapons and an explosive; plus, all the personnel involved admitted that they had aimed to kill the suspects.<sup>864</sup> It was established that the soldiers had made an attempt to arrest the suspects as a first option, and the effort to proceed with this plan was corroborated.<sup>865</sup> The fact that neither of the soldiers was an expert on explosives was also taken to the court as

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<sup>859</sup> *ibid* [185]-[186]

<sup>860</sup> *ibid* [187]

<sup>861</sup> *ibid* [188]-[190]

<sup>862</sup> *ibid* [191]

<sup>863</sup> *ibid* [194]

<sup>864</sup> *ibid* [199-200]

<sup>865</sup> *ibid* [202]

an argument to consider that the use of lethal force could not be avoided.<sup>866</sup> However, although the Court considered the fact that the military personnel did in fact establish that they had no other resource but to open fire when they tried to detain the suspects, they also addressed the fact that the deceased were given entrance to Gibraltar knowing that such persons were already been profiled by the security forces, and that a surveillance team at the border, which collaborated with an arrest group existed.<sup>867</sup>

The Court established there had been a “serious miscalculation by those responsible for controlling the operation”,<sup>868</sup> as the government’s argument stated that at the time of their arrival to Gibraltar they still did not have enough elements to press charges against them, but the majority of the judges considered that the safety of Gibraltar’s population was a priority. By consequence, if there were any suspects of terrorism entering the country, they should have been stopped at that moment.<sup>869</sup> The soldiers’ testimony which stated that they were indeed trained to kill at their first reflex was considered by the court as below the standards that security forces should have in contemporary democratic societies, even in the case of suspects of terrorism.<sup>870</sup> For this reasons, the Court established by majority<sup>871</sup> that there had been a breach of article 2 paragraph 2, established in the European Convention of Human Rights.<sup>872</sup> Regarding this article, the Council of Europe developed an analysis on The Right to Life on their series of Human rights handbooks. On the topic of the use of lethal force by State agents, Korff references article 148 of the *McCann and Others v The United Kingdom* case, regarding the

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<sup>866</sup> *ibid* [209-210]

<sup>867</sup> *ibid* [203]

<sup>868</sup> *ibid* [205]

<sup>869</sup> *ibid*

<sup>870</sup> *ibid* [211]-[212]

<sup>871</sup> *ibid* [214]

<sup>872</sup> Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

intention of article 2-2 to describe under what conditions can the use of force be exercised.<sup>873</sup>

The main point to address here is the study of rights violated that the court did, and by their judgement one can infer that they established that it was preferable to violate certain rights such as freedom of movement. After all, by violating “less fundamental” rights, the right of life of both the population and the terrorists themselves would have been more protected. The fact that the suspects did not carry any weapons or explosives with them, and they were shot by the security forces just because it was a natural reflex for them, provided the argument that there was indeed a shoot-to-kill policy a strong support. This was a behaviour which was taught to the soldiers while in their training; in modern democratic systems, the focus on the rights of all civilians -even those suspected or accused of a crime- must be a priority of the state. A formal training in matters of human rights was encouraged to be trained in the military culture. The Report of the Independent Commission on Policing for Northern Ireland established that it was necessary to minimize the risks for the security forces, but if the State wanted to normalise the situation they would have to move towards a goal that involved routinely unarmed police, which should be subjected to periodical reviews that analysed the current situations.<sup>874</sup>

#### **5.14 The violation of human rights on Northern Ireland**

The context of the human rights violated in Northern Ireland and the long-lasting situation of unconventional provisions which were set up in order to attend what was considered an emergency situation should be addressed here. In this part of the chapter the emergency provisions and its consequence on human rights violations will be analysed besides the case studies of citizens whose fundamental rights were jeopardised or blatantly violated. An important aspect to consider was the fact that both the PTA and the EPA were intended to be used in a temporal way, as a state of emergency policy cannot be indefinite (it was until the year 2000, when the PTA changed its scope to focus on terrorism on a global scale, and the EPA went through various amendments until the Good Friday Agreement took place in 1998, that most of the EPA structure was repealed; now the Civil Contingencies Act 2004 would be the framework which is most related to the EPA). The conflict in

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<sup>873</sup> D Korff, *The right to life: A guide to the implementation of Article 2 of the European Convention on Human Rights* (Council of Europe, Belgium 2006) 23

<sup>874</sup> Independent Commission on Policing for Northern Ireland (n 667) [8.19]

Northern Ireland went through different stages; not only in the development of the IRA's development, but also in the way that the British government responded and the reforms that they introduced in order for the police to take the primacy over security duties in a gradual way.

The struggle of human rights activists to have the army removed from the main security duties took various years; Hillyard points out that apart from the emergency provisions established, a strategy of military enforcement was developed on par.<sup>875</sup> This statement is supported by the figures that the author presents: when the British army was first deployed in 1969, the number of constabularies consisted of 3,044 officers who had thousands of auxiliary members, but only 100 were full-time employees. By 1973 the figure had gone up to almost 35,000 security members, with the majority being full-time workers. By 1990, the whole security policy had involved the work of an estimated 21,500-23,000 security forces.<sup>876</sup> The primacy of the army was stronger between 1972 and 1976, as it was estimated that 80 per cent of the security personnel who were in the Northern Irish streets were military personnel. It was until then-Secretary of State Merlyn Rees changed the strategy and strengthened the constabularies in order to put them at the front of the security tasks.<sup>877</sup> Hillyard points that the majority of constabularies were Protestant, stating that employment in security had become a very important matter to the community, and added that this situation created "a vested interest in the continuing emergency"<sup>878</sup> for the Protestants. The emergency situation that gave way to the legislation of the referred provisions was seen by many as the only option left, because the acts of terrorism committed by the IRA were considered as a way to overthrow the government in turn.<sup>879</sup> A change in the structure of security was accompanied by a change in the view of seeing the political actions as a different type of crime, as at first it was seen as a matter of national identity.<sup>880</sup> This was clearly a way of simplifying not only the social repercussions of the security strategy, but also to change the structure of the legal paths developed to deal with this issue.

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<sup>875</sup> P Hillyard (n 761) 192

<sup>876</sup> *ibid* 192

<sup>877</sup> *ibid* 193

<sup>878</sup> *ibid* 193-194

<sup>879</sup> *ibid* 201

<sup>880</sup> *ibid* 201-202

#### **5.14.1 The Northern Irish emergency legislation and its consequences on human rights**

According to Human Rights Watch the emergency regime violated civil liberties through the Emergency Provisions Acts and the Prevention of Terrorism Act, both of which were used to intimidate and harass people.<sup>881</sup> The same report also established that “emergency laws, such as those in force in Northern Ireland, often serve to perpetuate political violence by creating an environment in which individual human rights are routinely violated”.<sup>882</sup> The Report of the Independent Commission on Policing for Northern Ireland also established the government to drop the emergency legislation in favour of the same law as the rest of the UK when the British Government issued a document<sup>883</sup> which established that a new legislation concerning terrorism should be issued with the same standards for all the UK.

The commission led by Asmal expressed that one of the main problems that came as a consequence of the settling of emergency provisions was the lack of protection from abuse of the security forces, as the strategy had various consequences including situations of injustice, lack of independence at the time of detention, and the absence of a system that could be implemented to file complaints against the security officers.<sup>884</sup> The commission explained that while many legal changes had been made in order to deal with the political violence, very few reforms had been done in order to protect society from abuses, especially the non-state actors who were responsible for the violence constituted a minority in the Northern Irish society.

The analysis by the commission finished the topic of emergency powers stating that these provisions did not work in order to stop the violence, but only a political settlement would indeed put an end to the conflict.<sup>885</sup> The rationale behind this argument was that violence could not be contested with more violence, as the conflict had a political origin. Commissioner Professor Richard Falk expressed that the security strategy employed by the State needed to have the support from the

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<sup>881</sup> Human Rights Watch (n 758)

<sup>882</sup> *ibid*

<sup>883</sup> Home Office, *Legislation Against Terrorism: A Consultation Paper* (Cmnd 4178, 1998)

<sup>884</sup> Northern Ireland Human Rights Assembly (n 738) 64

<sup>885</sup> *ibid*

Northern Irish community, and because of this the emergency provisions should only be applied when absolutely needed, as transparency and publicity were important factors to be taken into account (he explained that the strategy needed to gain more popular support, and for this reason the stop and search mechanisms needed to be reformed). We can conclude establishing that the Northern Irish security strategy lost most of its support when it interfered with the rights of people who were not connected to the parties in conflict. If a strategy affects the normal life of the common citizen, support will decrease the longer such strategy is maintained without reforms that guarantee the minimum protection to citizens' fundamental rights.

### **5.15 The State's duty to investigate deaths in which officials are involved**

Article 2 of the ECHR has addressed three duties on the State;<sup>886</sup> among them is the obligation of the State to investigate any deaths in which State officers are involved. The *McCann v UK* case referenced article 9 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,<sup>887</sup> as the Court established that in order for the State to compel with article 2 of the ECHR, that "the State must provide an effective ex post facto procedure for establishing the facts surrounding a killing by agents of the State through an independent judicial process".<sup>888</sup>In *R (Middleton) v West Somerset Coroner*, the United Kingdom House of Lords addressed that the procedure of an investigation "must work in practice and must fulfil the purpose for which the investigation is established".<sup>889</sup>

The current requirements for the State regarding the protection of its citizens' life has gone even beyond the deaths caused directly by officials; in

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<sup>886</sup> E. Grey, "The Investigative Obligation under Article 2 of the European Convention on Human Rights – When does it arise?" (39 *Essex Street*) 2  
<[http://www.39essex.com/docs/articles/EGR\\_Investigative\\_Obligation\\_seminar\\_250107.pdf](http://www.39essex.com/docs/articles/EGR_Investigative_Obligation_seminar_250107.pdf)>  
> accessed 1 June 2016

<sup>887</sup> Article 9. There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

<sup>888</sup> *McCann and Others v The United Kingdom* (n 811) [157]

<sup>889</sup> *R (Middleton) v West Somerset Coroner* UKHL 10 [2004] [8]

*Anguelova v Bulgaria*, the ECtHR established that “Persons in custody are in a vulnerable position and the authorities are under an obligation to account for their treatment. Consequently, where an individual is taken into police custody in good health but later dies, it is incumbent on the State to provide a plausible explanation of the events leading to his death”.<sup>890</sup> It can be established that the State has the obligation to procure the safety of the citizens when they are in the reach and physical sphere not only of its agents themselves, but also inside or within the scope of institutional protection. The duty to investigate in relation to art 2 of ECHR was determinant in subsequent trials in Northern Ireland, to grant access to justice to the victims of State officials.<sup>891</sup>

### **5.16 The rights of the soldiers**

To end this chapter, the importance of an integral system that guarantees respect to the soldiers’ human rights needs to be discussed. An integral part of modern democratic military systems is focused on the basic rights of military personnel, whether the subject is a commander or a private, as the rank is irrelevant in this matter. As members of an institution in charge of one of the most complex and high-risk tasks in any society, an adequate system that guarantees not only the fulfilment of their tasks but also the human rights of their own personnel is essential.

Which is the fundamental base for the modern status of the armed personnel that can be used to compare past and present conditions of the army, both in the Northern Irish and the Mexican case? The discussion about Germany in the previous chapter brought a basic theoretical approach which has been materialised in the concept of the “citizen in uniform”, which, as its paragraph 132 reads, established that “a citizen serving in the armed forces makes a personal contribution to the protection of freedom and the safeguarding of peace while at the same time retaining his rights as a citizen., to the extent that the necessities of military service arising from the mission make restrictions inevitable”.<sup>892</sup> As the *Innere Führung* address in its fundamentals, there are essential matters which should be addressed when developing the legal and sociological background of any institution, and human rights should to be a top priority. The *Innere Führung* establishes the

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<sup>890</sup> *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002) [110]

<sup>891</sup> See *Kelly v United Kingdom*, *McShane v United Kingdom*, *Shanaghan v United Kingdom*

<sup>892</sup> Fundamentals, Leadership and Civic Education (Federal Ministry of Defense, Bonn 1993) [132]

“preservation of peace in freedom”,<sup>893</sup> which is considered a basic ground for the legitimacy and democratic order of the armed forces.

The OSCE Code of Conduct on Politico-Military Aspects of Security is relevant here. This framework was established in 1994 and it has been considered a breakthrough in security affairs that addressed military nature. The US Department of State conceives this code is the commitment of “States, inter alia, to maintain only such military capacities as are commensurate with legitimate individual or collective security needs, and stresses the right of each participating State to freely determine its security interests and to choose its own security arrangements - including treaties and alliances”.<sup>894</sup> Leigh and Born establish four main principles established in different articles contained in the framework:

The primacy of constitutional civilian power over military power (paragraphs 21-26); the subjection of armed forces to international humanitarian law (paragraphs 29-31 and 34-35); respect for the human rights of members of the armed forces (paragraphs 23, 27-28, and 32-33); and limits over the domestic use of force to what is commensurate to their legal mission and restricting interference with the peaceful and lawful exercise of human rights (paragraphs 36-37).<sup>895</sup>

It can be stated that these primacies are the base for any democratic army, as such principles are minimums required to build a positive relationship with civil society in the case of deployment, and even more important when the conflict has a domestic nature.

The Code of Conduct explicitly establishes essential standards for States, as its paragraph 32 states that “Each participating State will ensure that military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms as reflected in CSCE documents and international law, in conformity with relevant constitutional and legal provisions and with the requirements of service.”<sup>896</sup> Indeed, it is important, as Leigh and Born point out, that the principles of this code (in particular, the “citizen in uniform” aspect), are

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<sup>893</sup> *ibid* [103]

<sup>894</sup> “U.S. Responses to the OSCE Code of Conduct” (*U.S. Department of State*) <<http://www.state.gov/t/avc/cca/c43839.htm>> accessed 10 March 2015

<sup>895</sup> H Born, I Leigh (n 591) 29

<sup>896</sup> Organization for Security and Co-operation in Europe (OSCE) Code of Conduct on Politico-Military Aspects of Security (3 December 1994) [32]



introduced in different ways, depending on each country's particular context.<sup>897</sup> This is where the issue that gave birth to the deployment in Northern Ireland and Mexico differed drastically, as the counter-insurgency strategy against the IRA was created with a very different outcome in mind than the Mexican strategy set to fight organised drug cartels. The same authors also establish that the same freedoms and rights applied to common citizens should also be applied to the armed personnel. As Leigh and Bonn mention, establishing a clear-structured human rights framework prevents the governments from misusing the army in prejudice of the population.<sup>898</sup>

During the “troubles” in Northern Ireland various allegations of human rights abuses committed by the British army were reported by civilians; such allegations included strip-searching, sexual assault, psychological torture (such as the exhibition of pictures featuring mutilated limbs), death threats, physical assault, and deprivation of medicines to the ill.<sup>899</sup> These abuses took part mostly in detention centres, which also showed the institutional fragility of the strategy dealing with the handling of suspects. The animosity between the civilians and the British army in everyday life during the “troubles” increased in hostility as the deployment continued with the same strategy; as one marine described: “We used to go out on patrol every night and have a gunfight, every night, guaranteed. You’d go round next morning doing the daytime patrols and you’d get a character standing at a doorway saying, ‘Get any of us last night? Try again tonight.’ And you knew he would too.”<sup>900</sup> Another sergeant testified the following: “...whatever we did would be interpreted as the exact opposite: if you helped an old lady across the Falls Road you were trying to push her in front of a taxi – there were no ifs or buts. We were normal everyday blokes, professional blokes, doing a job, like what a priest does – it’s a vocation to be a good soldier, a soldier in Northern Ireland. Nobody else could do that job – the Yanks, forget it, that’s a joke; the UN, forget it, they wouldn’t understand, wouldn’t have the mentality. The British tom is so vastly underrated by our own people.”<sup>901</sup> Such recollections were the result of a failed strategy, which increased the sense of

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<sup>897</sup> H Born, I Leigh (n 591) 18

<sup>898</sup> *ibid* 23

<sup>899</sup> Northern Ireland Human Rights Assembly (n 738) 33

<sup>900</sup> M. Arthur, *Northern Ireland: Soldiers Talking* (Sidgwick & Jackson, London 1987) 80

<sup>901</sup> *ibid* 117

abandonment that the soldiers felt from the political leaders that took the most important decisions regarding the security policies.

As stated above, the guidelines contained in the Code of Conduct provision are relevant in any operation where the armed forces are deployed, because they point out the obligation of States to adapt their domestic legislations and institution regulations to the standards of such code; Leigh and Born have considered the following paragraphs as the most relevant in matters of human rights for the soldiers<sup>902</sup>: paragraph 23, which establishes the need of political neutrality in the fulfilment of their personnel's civil rights. This obligation has as its main goal the guaranteeing of an equal treat to every citizen when the armed forces deal with an emergency or security threat. As it will be seen, this principle was not fulfilled during the years of the "troubles" in Northern Ireland. Arthur<sup>903</sup> collected hundreds of testimonies of military personnel of all ranks who were deployed during the 70s and 80s in Northern Ireland, and among such testimonies were allegations which indicated that soldiers were not given a full explanation of the political conflict which was taking place, as they were only given orders to fight the IRA. One Corporal explained it in the following way: "Before, most English soldiers were not really aware of the Protestant/Catholic divide; that was a political issue. They didn't like the Catholics because the IRA came from there, and because they only saw Catholics in conflictual situations, but when they faced the Protestants in Belfast they began to see the other side of the picture, to understand the ways in which Catholics were discriminated against."<sup>904</sup> This view was a consequence of a lack of understanding of the political context, which had a consequence the escalate in violence in Northern Ireland. This contrasts with the approach that the German military took, where they were educated on the social context they were part of, in order to politicise the soldiers.<sup>905</sup>

Until what extent the basic human rights of the soldiers can be limited? There might be obvious concepts such as the right to life that would be pointless to question, but there are certain rights such as the right of being treated with dignity (article 7 of the Civil and Political Rights Covenant establishes this as "degrading

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<sup>902</sup> H Born, I Leigh (n 591) 17

<sup>903</sup> M Arthur (n 900) 80

<sup>904</sup> *ibid* 84

<sup>905</sup> *Innere Führung* (n 544) [5]

treatment”<sup>906</sup>), which tends to be a usual complaint made by the armed personnel every time they are deployed on long missions. The Northern Irish soldiers had a sense of abandonment from their political heads; as a Lieutenant stated, “The men felt very much that they were being used..... the British soldier in a far-flung post somewhere, where the climate is bloody awful, the equipment they need doesn’t arrive, the press they get is bad press and the politicians at home don’t care anyway. There is a tremendous ‘useful resignation’ about the British soldier.”<sup>907</sup> Article 8 (2) (b) (xxi) defines degrading treatment as “the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity”.<sup>908</sup> If we use the “citizen in uniform” concept as a base to judge the complaints of the British soldiers deployed in Northern Ireland, a violation of this right can be established, as the behaviour of the British State jeopardised the army’s morale and did not provide them with enough support on mission that involved such a high risk. Leigh and Born also establish that adequate training is highly important for military personnel, not only in technical and practical matters, but also in human rights law; according to the authors, this will enable a better relation between troops,<sup>909</sup> and it can be added that a change in the dynamic of their inner-relationships would also impact in their duty. The phrase “useful resignation” is also an indicator of the level of dissatisfaction and lack of *conscientious objection* that members of the British army suffered from. Regarding this concept, it is relevant to address the Innere Führung and its guideline 5, which refers to matters regarding order and obedience. The referred provision establishes that in order to obey orders from their superiors the personnel must proceed in a *conscientiously* way, always taking into account that obedience has its limits.<sup>910</sup> A co-relation between freedom in decision-taking and a higher morale can be established, as the sense of duty and obedience is not taken with a feeling of resignation (which impacts in the way of their interaction with civilians).

The importance of an adequate training is essential to set a standard of behaviour and a critical stance about the responsibilities that being a soldier implies.

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<sup>906</sup> ICCPR, art 7

<sup>907</sup> M Arthur (n 900) 80

<sup>908</sup> UNGA “International Criminal Court Elements of Crimes” (2000) UN Doc PCNICC/2000/1/Add.2, art 8(2)(b)(xxi)

<sup>909</sup> I. Leigh, H. Born (n 591) 218

<sup>910</sup> Fundamentals, Leadership and Civic Education (Federal Ministry of Defence, Bonn 1993), guideline 5

Setting a standard is important for the reason that each soldier comes from different background and life-experiences, a fact that influences their behaviour. Two testimonies from the British army exemplify this last statement: a corporal stated that soldiers were not required in Northern Ireland. Instead, he said, there should be “peacekeepers, policemen, civilians who are nice to people twenty-four hours a day; diplomats, whatever. But not soldiers; I mean, they gave me thousands and thousands of pounds’ worth of training to get me to this stage and I’m wasted on a street in Belfast”.<sup>911</sup> Meanwhile, another corporal expressed the following: “get the idea that many soldiers go to Northern Ireland with big expectations and come back disappointed because they haven’t fired a shot. It’s a bit like going to Spain and coming back without a suntan”.<sup>912</sup> These two examples from members of the same rank are self-explanatory: both soldiers viewed the conflict from opposite perspectives; this underlines the importance of developing human rights training, as a minimum standard is necessary in every troop.

### **5.17 Conclusions**

The violent relation between two well-defined groups (Protestants and Catholics) proved to be a much more difficult task for both the Northern Irish and British governments than what they expected. The first attempts at restabilising peace during the 1960s did not work and the British Army had to aid in counter-terrorism tasks. As the facts can prove, there was not a lack of political will from the State in order to settle the internal disputes that polarised the Northern Irish society, but the government did take decades in order to understand that the root of the conflict could not be solved just by legal and institutional reforms; a political settlement was also needed. The Londonderry march and *Bloody Sunday* were the consequences of the lack of political analysis of the real scope of the situation done by the government; it should be noted that the security strategy of strong enforcement became more severe after these events. The Hunt report was one of the first steps to reform the security strategy, but these measures would be the start of an era of enormous instability for the Northern Irish society and the UK government.

The emergency regime only gave brief positive results before new terrorist tactics were learned and employed. Plus, commissions such as the Stevens report established that as time passed the security bodies became more engaged in

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<sup>911</sup> M Arthur (n 900) 252

<sup>912</sup> *ibid*

corruption and more resistant to be subjected to accountability reports. One lesson that can be taught is that the army's legitimacy decreases the longer they are deployed on a determined territory, especially when they are confronted with non-state actors in a domestic Conflict. The fact that analysts like Coogan established that the number of soldiers was disproportionate to the number of armed Republicans, shows that civil-military relations during the 1970s in Northern Ireland were far from achieving positive cooperation. It can be stated that one of the most positive decisions taken was the gradual replacement of the army by civilian security bodies, as the shoot-to-kill policy antagonised both sides of the conflict and increased the violent reaction from the terrorists.

Internment was another controversial measure which needed to be replaced in a short space of time, as the number of mistakes and innocents that were subjected to human rights violations contrasted with the State's rhetoric of searching for peace. The use of the "five techniques" and other methods of torture only created more animosity between the nationalists and the government; the issue of the lack of an efficient system of accountability arises here again, as the abuses committed in the detention centres were left in a state of impunity most of the time. Regarding the Diplock Courts, it can be stated that they were in fact very useful, as it was proved that the behaviour of the judges did not change in a radical way when they received more power and control over the evidence in a trial. The powers of stop and search, and arrest had highly negative consequences, as it alienated both the Catholic and the Protestant community against the security forces who were in charge of these measures due to the high level of harassment and assault committed in public spaces. The concept of what was the reasonable suspicion to search and eventually arrest a citizen was the subject of controversy, and without a defined mechanism it proved to create more animosity between the security forces and the Northern Irish population.

The Northern Irish experience also shows that the longer a state of emergency is active, the more society gets affected. Large parts of society are directly and indirectly damaged by domestic armed conflicts, and as security measures increase their enforcement, the number of human rights violations rises. Northern Ireland has been establishing various commissions of truth, which most of the time are the only way in which the victims of State abuse and their relatives can access to justice, even if it is in a symbolic way. If the establishment of an emergency regime does not have a well-established plan, it can become the main source for justifying human rights violations.

The events unfolded as a consequence of the granting of special powers to the security forces (and in particular the armed forces, as these are trained to react more violently to aggressions) needed to be accompanied by very strict limits, and the resource to use lethal force should have been avoided until there was no other option left; the reason behind this argument is to avoid the violation of human rights as much as possible. It is understandable that in a violent domestic conflict there will be some degree of collateral damage, but the State's obligation is to maintain the rule of law and respect for fundamental rights in order to make the breaching of them an exception, and avoid normalising the lack of respect for human rights.

The UK government has learned lessons from the Northern Irish experience, as they have currently developed the *Joint Doctrine Publication*, especially made for dealing with the need of the UK army to detain or capture citizens, both in an international or non-international conflict. Domestic intervention is specifically stated in *Part 2 paragraph 6 of the Operations in the UK: A Guide for Civil Responders*, which refers us to the Emergency Powers Act 1964, in which the army can be granted special attributions under a certain context.<sup>913</sup> This document states that the legal grounds to develop a military operation are: a United Nations Security Council Resolution; a humanitarian intervention; the consent of the recognised government of a host nation; and state self-defence.<sup>914</sup> In the case an internal armed conflict, the Joint Service Manual of the Law of Armed Conflict establishes article 3 of the Geneva Conventions 1949, and the Additional Protocol II 1977 as the main provisions where the basic rules are.<sup>915</sup> The same document states in its section 15.10 and 15.10.1 that there is a duty to protect persons who are not active in the hostilities, and includes both civilians and combatants who have surrendered or are out of action.<sup>916</sup> Finally, the soldiers are forbidden to displace civilians unless there are military reasons for this, and also evacuate them without any type of

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<sup>913</sup> Part 2 – Military Operations in the UK, *Operations in the UK: A guide for Civil Responders* (Joint Warfare Publications, 2<sup>nd</sup> ed, Wiltshire 2010) 2

<sup>914</sup> Ministry of Defence, *Joint Doctrine Publication 1-10 Captured Persons (CPERS)* (3<sup>rd</sup> edn, The Development, Concepts and Doctrine Centre, Wiltshire 2015) 1-5

<sup>915</sup> The Joint Doctrine & Concepts Centre, *The Joint Service Manual of the Law of Armed Conflict* (Joint Warfare Publications, Wiltshire 2004) 383-384

<sup>916</sup> Development, Concepts and Doctrine Centre, *Joint Doctrine Publication 0-01 UK Defence Doctrine* (3<sup>rd</sup> edn, Ministry of Defence, Wiltshire 2015) 1-5

<sup>916</sup> The Joint Doctrine & Concepts Centre (n 915) 391

selectiveness.<sup>917</sup> This would be a more described text about the deployment in the armed forces, which at a domestic level is contemplated in the Civil Contingencies Act,<sup>918</sup> which states that an Act of Parliament or a Royal Prerogative can enable the Defence Council to deploy the armed forces, or it can establish a provision to enable such deployment.

To show an additional contemporary example, the British government has developed the United Kingdom Operations (UK Ops), which include the figure known as the Defence contribution to resilience. As the official document states, the term *resilience* in military terms can be described as “the degree to which people and capabilities will be able to withstand, or recover quickly from difficult situations; wherever possible, capabilities, systems and munitions that have utility across a range of activities, high levels of reliability and robustness should be procured”.<sup>919</sup> In the legal scope, the Civil Contingencies Act establishes in its section 19(c) that “war, or terrorism, which threatens serious damage to the United Kingdom”, will be considered an emergency.<sup>920</sup> The UK Ops also states in the document that criminal activity should receive a civil response, but under certain circumstances military force might need to be applied.<sup>921</sup> The Civil Contingencies Act clearly specifies the procedures and requirements that are needed to implement emergency measures; this act has a strictly civilian nature which would set the limits from the armed forces under Common Law rules.

Finally, regarding the rights of the soldiers, it should be pointed that standards on human rights training for the armed personnel did not exist when the British army was deployed, as the scope that some soldiers had differed drastically between them. It should be added that before deploying troops in a conflict which had primarily a political origin, the whole context should be explained to everyone participating as a member of a security body, as the testimonies of the military personnel state that most of them did not understand the cause that divided the

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<sup>917</sup> Development, Concepts and Doctrine Centre (n 916) 1-5

<sup>917</sup> The Joint Doctrine & Concepts Centre (n 915) 392

<sup>918</sup> Civil Contingencies Act 2004 s 22(3)(l) and (m)

<sup>919</sup> Development, Concepts and Doctrine Centre, *Joint Doctrine Publication 1-10 Captured Persons (CPERS)* (3<sup>rd</sup> edn, Ministry of Defence, Wiltshire 2015) V

<sup>920</sup> Civil Contingencies Act 2004, part 2 art 19(c)

<sup>921</sup> Development, Concepts and Doctrine Centre (n 919) 1-7

Northern Irish society. Apart from the adequate human rights training, institutional reforms which ensured that the military had a “citizen in uniform” quality should have been established before the deployment.



## Chapter VI

### **The German post-WII institutional reforms, the emergency powers declared in Northern Ireland, and their potential implementation in Mexico: a comparative study**

The central goal of this project is to analyse the civil-military reforms in Germany and Northern Ireland, addressed in the previous chapters, and use them as the base for a comparative study with the current institutional and legal military system in Mexico. Both European countries faced regarding issues such as lack of accountability and human rights abuses by their armed forces; this draws similarities with the current context that has been striking Mexican society for the past 8 years. One of the main points that should be clarified in this introduction is the fact that *this is not a comparative study between Germany and Northern Ireland*, but instead *both countries are compared to Mexico* in different aspects. The German institutional reforms that allowed the development of highly democratic controls over its armed forces will be contrasted with the current system of institutions that monitor the army in Mexico. Regarding Northern Ireland, the different emergency provisions, its subsequent amendments, and also figures like Internment will be compared against the Mexican current legal system that allowed the deployment of the army.

Germany<sup>922</sup> has been selected as one of the countries to develop a comparative study. In this case, the institutional reforms concerning the armed forces, and its democratic transition that took place after World War II, are the objects of study. Their armed forces went through a complete restructuring, as the army which served during the Nazi regime was completely dismantled after WWII, and was reinstalled until 1954 under the name of *Bundeswehr*.<sup>923</sup> The main ideology behind this restructuring was the development of a strong civilian control in order to avoid repeating the Nazi experience, where the executive had a complete control over the army and there were no mechanisms to prevent this.

Subsequently, the concept of the “citizen in uniform” was created in order to provide the soldier with the same rights and obligations as the civilian security

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<sup>922</sup> Refer to heading 4.1. “The German post WWII military reforms: a lesson for the Mexican case?”

<sup>923</sup> G Nolte, H Krieger (n 532) 341

forces and civil society in general. This included mechanisms that gave armed personnel more control over their own actions and the orders they received from their superiors. The increase in the soldiers' rights is also a matter of comparison, as highly defined structures have been developed for them to issue complaints. The *Innere Führung* that was created in Germany will be the source of comparison with the current Mexican standards, along with figures such as the military ombudsman and the civilian minister of defence (it should be noted that at the moment of this writing, Dr. Ursula von der Leyen occupies such position, being the first woman in the history of Germany who is appointed as a Minister of Defence<sup>924</sup>). The constitutional provisions, in which the relationship between the executive, the legislative and the armed forces are based, are also part of this study. These provisions have been successful to secure the army from being used without the consent of both powers, with the legislative having more control over it than the executive.

Comparing the reforms done in Germany with the current Mexican institutional ground is important due to the high number of civilian complaints regarding the lack of accountability of the armed forces in Mexico. In the first chapter of this research, a number of emblematic cases were referenced and explained in detail, but more events of high relevance have taken place since then. Human Rights Watch have addressed various events, such as the disappearance of 43 students in the southern city of Iguala (in which HRW documented allegations that the students were seen 100 metres from a military base<sup>925</sup>), and the Tlatlaya case, where military personnel executed more than 20 persons inside a warehouse, and where the National Human Rights Commission determined that approximately 12 persons were extrajudicially executed<sup>926</sup>. There are more recent cases where security forces are involved, but for the purpose of this research the focus is kept on cases where the army was involved. As it has been stated in previous chapters, a recent reform has allowed civilian courts to try military personnel who are involved in human rights abuses of civilians, but at the moment of this writing there has not

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<sup>924</sup> "Ursula von der Leyen" (*Federal Ministry of Defence* 15 January 2014)  
 <[http://www.bmvg.de/portal/a/bmvg/!ut/p/c4/04\\_SB8K8xLLM9MSSzPy8xBz9CP3I5EyrpHK9pNyydL3czLzM4pLUoszSXL2U1KJ4GF-vtKi4NCcxviw\\_Lx4knpNamZqnX5DtqAgA2ZXRuQ!!/](http://www.bmvg.de/portal/a/bmvg/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP3I5EyrpHK9pNyydL3czLzM4pLUoszSXL2U1KJ4GF-vtKi4NCcxviw_Lx4knpNamZqnX5DtqAgA2ZXRuQ!!/)> accessed 13 June 2015

<sup>925</sup> "Mexico: Delays, Cover-Up Mar Atrocities Response" (*Human Rights Watch*),  
 <<http://www.hrw.org/news/2014/11/07/mexico-delays-cover-mar-atrocities-response>>  
 accessed 13 June 2015

<sup>926</sup> *ibid*

been a judgment pronounced on such cases. These are examples that illustrate the current weaknesses in the institutional structures in Mexico, which this research attempts to compare with the German current policies, in order to adapt and create the possibility of applying selected figures from this system to the Mexican one.

In the case of Northern Ireland, the main parallels with Mexico reside in the role of the armed forces as the primary security bodies fighting against a non-State actor. In the first case it was the Irish Republican Army, and in the Mexican context the drug cartels are the groups clashing with the State forces. As it has been exposed in the previous chapter, we need to take into account the fact that the conflict in Northern Ireland had a clearly defined political nature, as the source of the conflict was the polarisation between the Republican and the Loyalist community, with all its consequences. On the other hand, the security conflict in Mexico has a global scope if seen from a geopolitical point of view (as it was explained before in this research, the drug conflict in Mexico would not be understood without this country's vicinity to the United States), and the non-State actor that the security bodies are fighting against has a defined illegal goal: the production, distribution and selling of drugs.

Taking this into account, the emergency powers established in Northern Ireland had as an unwanted consequence the rise of human rights abuses across the main sites of the conflict, but the legal provisions established were more structured and defined than their Mexican counterparts. The fact that State officers were tried and sentenced during the most conflictive era also indicated less tolerance for impunity, another matter for concern in Mexico at the moment. How did the Northern Irish society react to the deployment of the armed forces in contrast with the Mexican society? How does the figure of internment compare to the figure of *arraigo* ("hold") in Mexico, and which have the consequences been? How were the legal provisions that gave birth to the arrest, and stop and search policies compared to the ones in Mexico? The recommendations done to Northern Ireland about human rights will also be contrasted with the ones that Mexico has received, and the actions that each country had.

It is essential to address the fact that the domestic actors who confronted the State in Northern Ireland had identifiable political goals, whereas the non-State actors in Mexico (organised drug-cartels) have economic profit as their main goal. How can these differences allow a legal comparison? The answer is found in the methodology selected for this comparison, as the study is *only* based on the legal

provisions that were employed to activate emergency measures, both in Northern Ireland and Mexico, and the severe consequences that these had on sectors of the population whose human rights were violated. Even within the legal sphere, only relevant parts of the systems were compared, as a *microcomparison*<sup>927</sup> was selected as a methodological tool to implement the legal comparison. Also, only elements of the systems whose application (or eradication, like the Diplock Courts) proved to be successful in Northern Ireland, are used for this comparison, as the *functionality*<sup>928</sup> approach that was selected, in order to make a *de lege ferenda/de lege lata*<sup>929</sup> adaption to the Mexican legal system. Finally, this comparison used *refined positivism*,<sup>930</sup> which takes the cultural context of the objects in comparison into account, and used an *intracultural*<sup>931</sup> approach to select elements that both of the contexts analysed have in common. For this reason, the political settlements that took part in Northern Ireland are not analysed, but this does not affect the legal comparison at all.

## 6.1 Fundamental Rights and emergencies in Germany and Mexico

Germany and Mexico both share the same type of State structure: the republic; hence, the supreme legal institution in both countries is the constitution (called Basic Law in Germany, and Political Constitution in Mexico). It is the most important body of rules in a hierarchical order, and the one that establishes the essential attributions for the executive, legislative and judicial powers. It is appropriate to begin this study establishing what both constitutions establish about the use of the armed forces in non-international conflicts and states of emergency. There are important differences between the German and the Mexican State in terms of the powers that the executive and legislative powers have, and in terms of making use of the armed forces for emergency situations.

The Basic Law for the Federal Republic of Germany<sup>932</sup> establish the cases in which the armed forces will be used. As the provisions state, the limits and

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<sup>927</sup> Zweigert, Kötz (n 22)

<sup>928</sup> *ibid* 34

<sup>929</sup> J Karhu (n 32) 80-81

<sup>930</sup> M Zirk-Sadowski (n 27) 25

<sup>931</sup> P da Cruz (n 37) 235

<sup>932</sup> Article 87a

[Armed Forces]

situations in which the army can intervene for aiding civilian forces are clearly defined. In the Mexican Political Constitution, article 89 fractions VI<sup>933</sup> is the provision in which ex-president Felipe Calderón based himself, as the supreme commander of the armed forces, in order to use them justifying his decision by establishing that organised crime constituted a threat to society in general.

*How do the previous provisions impact the concepts of accountability in Mexico?*

Provisions like article 87a of the German Basic Law do not exist in the Mexican Constitution, as the power of using the army resides in the federal executive. Therefore, it is considered that the need for the approval of a majority of both chambers of Senators and Deputies should be essential in order to deploy the armed forces. There is a concept which is consistent in both constitutions, although

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(1) ...The Federation shall establish Armed Forces for purposes of defence....

(2) Apart from defence, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law.

(3) During a state of defence or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defence mission. Moreover, during a state of defence or a state of tension, the Armed Forces may also be authorised to support police measures for the protection of civilian property; in this event the Armed Forces shall cooperate with the competent authorities.

(4) ....if the conditions referred to in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police prove inadequate, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organised armed insurgents. Any such employment of the Armed Forces shall be discontinued if the Bundestag or the Bundesrat so demands.....

Art. 115a

Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defence) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag.

Article 115b

[Power of command of the Federal Chancellor]

Upon the promulgation of a state of defence the power of command over the Armed Forces shall pass to the Federal Chancellor.

<sup>933</sup> Art. 89: The faculties and obligations of the president are the following:

Fraction VI: Preserving national security, in the terms of the respective law, and dispose of the totality of the Armed Forces meaning the Army, the Navy and the Aerial Force for internal security and external defence of the Federation.

with noticeable differences in their development and legislative process. Article 115b of the German Basic Law and Article 89 fraction VI of the Mexican Constitution both establish that the federal executives can have the command of the armed forces. The fundamental difference is that the German Basic Law states that the Federal Chancellor can take command of the armed forces only after a *State of Defence* is declared, whereas the Mexican Constitution establishes that the command of the armed forces can always be used to preserve national security. This last statement is highly open to interpretation and does not establish any clear conditions in order to take command of the army.

The lack of a constitutional structure that focuses on the armed forces and the use that the State can make of them emergency situations, or internal armed conflicts, has an impact in the democratic order that Mexico wants to achieve. It has been 10 years after the first military deployment as part of the current security strategy, and no mechanism of civilian control has been developed. The result is a conflict between an important sector of society and the armed forces, based on the fact that hundreds of complaints of human rights abuses attributed to military personnel have not been solved in a satisfactory way. These abuses are a consequence of the inexistence of a democratic relationship between civilians and soldiers, and the lack of a legal structure that would protect society from these abuses. The constitution needs to be the first framework reformed in order to include a structured set of provisions on the armed forces, clearly and coherently defined, in which their attributions and limits are established, and where strong civilian controls are also set.

The Basic Law for the Federal Republic of Germany<sup>934</sup> has developed a clear structure that defines the human rights which can be restricted in states of emergency, as it leaves no room for ambiguous interpretations.

On the other hand, these are the non-derogable rights in the Political Constitution of the United Mexican States

...the following rights cannot be restricted: the right not to be discriminated; recognition of juridical personality, life, personal integrity, protection to family, name and nationality; rights of the infants; political rights; freedom of thought, conscience and professing any religious belief; the principle of legality and retroactivity; the prohibition of the death penalty; the prohibition of slavery and

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<sup>934</sup> Art. 17a (2): Laws regarding defence, including protection of the civilian population, may provide for restriction of the basic rights of freedom of movement (Article 11) and inviolability of the home (Article 13)

servitude; the prohibition of enforced disappearance and torture; nor the juridical guarantees which are basic to the protection of such rights...<sup>935</sup>

*Here we encounter a problem: the Mexican Constitution is highly restrictive and opens the door for human rights abuses. How can the Mexican provision be reformed in order to increase the protection of fundamental rights?*

Art. 17a (2) of the German Basic Law is more clear in establishing the rights than can be restricted at a certain point because it addresses specifically which ones are subjected to restriction. On the other hand, the Mexican Constitution provides a list of rights that cannot be restricted, but by establishing a “negative affirmation”, the list of fundamental rights which can be restricted becomes highly broad. In the German case, only two rights can be taken away in certain circumstances, but the Mexican supreme law is establishing that *only* certain rights can be left untouched.

Therefore, the Mexican provision legitimises the restriction of various fundamental rights and other secondary provisions. Article 29 paragraph 2 of the Mexican Constitution could benefit from a rephrasing which listed the rights that could be actively restricted, instead of listing the only ones that are safeguarded. If a state of emergency is declared, a list of the only rights that can be restricted would be clearer for both civilian society and the armed personnel, as the aim of the provision would not open the doors for different interpretations. The rephrasing of article 29 could benefit from the direct quoting of HRC General Comment 29 paragraph 6, because the recent Mexican reform uses the ICCPR as one of their international sources.<sup>936</sup> It would be beneficial if the reform was inspired in the following phrase from GC 29:

The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.<sup>937</sup>

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<sup>935</sup> Political Constitution of the United Mexican States 2016 (MEX), art 29 (2)

<sup>936</sup> Human Rights and Governmental United Commissions (n 347) 32

<sup>937</sup> General Comment No 29 (n 306) [6]

The addition of this paragraph could establish a path to legally challenge rights restrictions, by addressing that every particular context needs to be judged differently, in order to establish which rights can be subjected to restrictions or derogations.

#### **6.1.1 The legislative power and its function concerning emergencies in Germany and Mexico**

The German Basic Law establishes in its article 53a the existence of a joint committee that will take decisions regarding a state of emergency. Its paragraph 2 states that:

The Federal Government shall inform the Joint Committee about its plans for a state of defence. The rights of the Bundestag and its committees under paragraph (1) of Article 43 shall not be affected by the provisions of this paragraph.

In its first paragraph, article 53a establishes that the members of the Joint Committee *cannot* be members of the federal government, which serves as a mechanism for preventing the intervention of the executive in the decisions of the Committee.

This provision does not have an equivalent in Mexico, as the only model that could represent a light resemblance is the National Defence Commission in both the Senators and Deputies Chambers. In the case of the Senators Committee, article 76 fraction III of the Constitution<sup>938</sup> establishes that this commission should authorize the federal executive in order to deploy national troops *outside* the country, but it does not establish any guidelines on domestic military deployments. When ex-president Felipe Calderon announced the first troop settlement he did not consult the legislative power, and only his presidential staff did a press conference with the statements of all the members of the executive government related to security affairs. It is fundamental to create a strong figure in both the Senators and Deputies Chambers that will function completely independent from the executive, and whose authorization is strictly required for every operation that involves the presence of the armed forces regarding internal conflicts.

The chain of events in Mexico developed in a different way of the spirit established in the German basic law. As it has been stated before, ex-president

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<sup>938</sup> Art. 76 – These are exclusive faculties of the Senate: III.- Authorising (the federal executive), to allow the depart of national troops outside the limits of the country, the movement of foreign armed troops in national territory and the settling of troops of another power, for more than a month, in Mexican sea.



Calderón's decision to deploy the armed forces (and issuing a decree in order to create and justify and use of a special force body, after the armed forces had already been deployed) was unilateral, as it did not have the consent of the legislative power. One of the main points for issuing a state of defence is the faculty of the legislative to set time limits for the special regulations (as article 115c of the German Basic Law establishes<sup>939</sup>). This has never been defined in Mexico, as it has not been established for how long the armed forces and its operatives will continue operating in Mexico.

### **6.1.2 The figure of the Minister of Defence in Germany and its military counterpart in Mexico**

The existence of the Minister of Defence is crucial to understand the German State commitment with a drastic change of policy, which went from having an army completely controlled by the executive power, to handling the head of this institution to a member of civil society. Article 65a establishes that the Minister of Defence will have the command of the armed forces. As it has been established before, article 115a establishes that a promulgation of a state of defence will deliver the command of the armed forces to the Federal Chancellor.

In the case of Mexico, the chain of command starts with the executive power, as the President is officially called by the Political Constitution as the "First Chief of the Constitutionalist Army".<sup>940</sup> In a hierarchical order the next legal framework that establishes the faculties of the Supreme Commander would be the Organic Law of the Army and the Mexican Aerial Force, whose article 11 states that:

"The Supreme Command of the Army and the Mexican Aerial Forces will belong to the President of the Republic, who will exercise it himself or through the National Defence Secretary. To this effect, during his administration he will be denominated Supreme Commandant of the Armed Forces."<sup>941</sup>

There is not a provision that defines the powers of the President and the Secretary regarding the use of the armed forces in a clear way. This issue becomes

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<sup>939</sup> Article 115c [Extension of the legislative powers of the Federation]

2) To the extent required by circumstances during a state of defence, a federal law for a state of defence may: establish a time limit for deprivations of freedom different from that specified in the third sentence of paragraph (2) and the first sentence of paragraph (3) of Article 104, but not exceeding four days, for cases in which no judge has been able to act within the time limit that normally applies.

<sup>940</sup> Political Constitution of the United Mexican States 2016 (MEX), introduction

<sup>941</sup> Organic Law of the Army and the Mexican Aerial Force 2014 (MEX), art 11

more complicated due to the fact that the National Defence Secretary is a member of the armed forces. Article 15 fraction I of the Organic Law of the Army and the Mexican Aerial Force also establishes that the Supreme Commandant (the President), will be in charge of appointing the Secretary. The Internal Regulation of the National Defence Secretary establishes in its article 10 that the exclusive powers of the Secretary and all the most important features are established in cooperation with the President of the Republic<sup>942</sup> (article 10 fraction XII even addresses as an obligation of the Secretary to submit all the designations and removals of the Secretary's public servants to the President's consideration).

*Does the current Defence Secretary in Mexico allow civilian control? It can be stated that a civilian head of the National Defence Secretary, which could be accountable upon the Federal Congress and citizen organisations would improve the army's independence from the executive*

The attributions of the Federal Chancellor in Germany are clearly defined and strong control of society is ensured by the appointment of a civilian Minister of Defence. On the other hand, the Mexican Constitution and the Organic Law of the Army and Mexican Aerial Force need to establish clear limits between the executive and the secretary. Also, a civilian figure would increase the possibility of a stronger control from civil society over their armed forces in the future. There is no other mechanism at the moment, as the President is the only person who can elect the Secretary of Defence, and there is no appropriate framework for civil society to have a real intervention in this process. Like Khakee established, the legislative should also analyse the establishment of emergency powers in a periodical manner.<sup>943</sup> Even though the legislative should have an essential vote in the establishment of a state of emergency, Tushnet's theory would also complement this process adequately, as "mobilised citizens"<sup>944</sup> should review the emergency powers. It would

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<sup>942</sup> Internal Regulation of the National Defence Secretary 2009 (MEX):

Article 10.- The following attributions are exclusive to the Secretary General:

- I. ....Establishing, coordinating and supervising the politics of the Secretary, according to the objectives, goals and national politics that the President of the Republic determines....
- II. Submitting the issues of the secretary and its state entities to the agreement of the President of the Republic.

<sup>943</sup> A Khakee (n 291) 30

<sup>944</sup> MV Tushnet (n 311) 184

also be appropriate for the constitutional article 29 reform to include the power of civilian organisations to review emergency provisions and the use of the army.

Mexico has recently established the figure of state of emergency at a constitutional level; this reform can be highly beneficial in terms of control and accountability, but it should also be accompanied by the creation of more provisions that would regulate this type of emergency. A proper section on the constitution that provides the guidelines for the executive and the national defence secretary would develop into a beneficial relationship between these figures and the federal congress, as both would be subjected to accountability under the same civilian laws. Here lies the importance of reforming the provisions that empower the executive to appoint and remove the most important public servants in the secretary. The President's power over the bureaucratic structure of the armed forces should also be limited in the constitutional provisions.

### **6.1.3 The “Innere Führung” in Germany and the Mexican regulations on the behaviour and the ethics of the army**

In order to make a comparison that takes functionality and cultural background as essential elements, it should be mentioned that the current Mexican legislation is highly dispersed. There are approximately 12 legal frameworks and 62 internal regulations that cover different aspects of the armed forces. In order to make a comparison between the concept of *Innere Führung* and the Mexican frameworks which establish similar concepts, certain codes have been chosen. These are: The Mexican Army and Aerial Force Organic Law, the Mexican Army and Aerial Force Discipline Law; the Code of Conduct of the Public Servants of the National Defence Secretary; and The Army and Aerial Force Military Education Law. The reason for choosing these codes is the fact that the armed forces' powers and obligations are established in them. As the constitution does not dedicate a chapter to the army, their obligations and attributions are scattered around the secondary (in the hierarchical scale) frameworks chosen.

The *Innere Führung* is basic in order to understand contemporary civil-military relations in Germany. Chapter 2 paragraph 201 establishes that its main goal is to “ease the tensions arising from the rights and liberties of the citizen on the one hand and military duty on the other”.<sup>945</sup> The *Innere Führung* can be explained through the *citizen in uniform* concept, which describes the needs of the German

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<sup>945</sup> *Innere Führung* (n 544) [201]

soldiers. Such requirements consist in three main points: 1) to develop his personality freely; 2) to act as a responsible citizen; and 3) to be ready at all times to carry out the mission.<sup>946</sup>

204. The principles of *Innere Führung* constitute a standard to be met by the soldier in all his actions. They are also a guideline governing the activities of the members of the federal defence administration in the armed forces as well as their relations with service members.

This paragraph is also essential, because it specifies that the obligations stated in paragraph 203 are not restricted to the lower-ranked personnel, but apply to the whole German defence apparatus.

205. The armed forces are subject to the primacy of politics. Primacy of politics means that the armed forces answer to politicians who are responsible to parliament and that they are subject to special parliamentary control, a hierarchical order pervading all aspects of service and the principle of command and obedience.

This paragraph underlines the obligation of the armed forces to be controlled and accountable to the civilian State, as hierarchically they are below the parliament. Therefore, making it impossible for the executive power to have control of the army's actions, through both the Federal Chancellor and the Minister of Defence, as such position –as part of the defence administration–, is also accountable to parliament. We can see this being congruent with the social context in Germany after World War II, as the totalitarian control that the executive exercised over the army was prevented from happening again.

In order to make a comparison with the current Mexican legislation, the following provisions have been selected. As it has been addressed, the high number of Mexican laws and internal regulations makes researching for concepts a hard task to complete.

The Mexican Army and Aerial Force Discipline Law establish that:

“The fulfilment of the soldiers’ duty should be a sacrifice and with any personal interests aside; the Political Constitution, the nation’s sovereignty, loyalty to institutions and honour to the Army and Aerial Force should also be fulfilled.”<sup>947</sup>

This article refers to the Political Constitution and the Mexican institutions in general. If the constitution establishes that the supreme commandant of the army is

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<sup>946</sup> *ibid* [203]

<sup>947</sup> Mexican Army and Aerial Force Discipline Law 2004 (MEX), art 1 bis

the President, it can be established that the military personnel must obey his orders at any point. This provision does not make any explicit mention to society, in contrast with the Guidelines for the Practical Application of the Innere Führung which establish that:

Each and every soldier has the basic duty to loyally serve the Federal Republic of Germany and bravely defend the rights and freedom of the German people which may even necessitate risking his life. The basic free and democratic order guarantees freedom and justice. The soldier must respect this basic order and uphold it in all his actions.<sup>948</sup>

The German provision explicitly mentions essential concepts that reflect the cultural aim of the “citizen in uniform”: the defence of society, democracy, freedom and justice. These concepts are essential in order to set a defined line between the authoritarian State of the Nazi regime and the contemporary German State.

By its part, The Mexican Army and Aerial Force Organic Law establish in its first article that both such institutions have the following main duties:

I. Defending the integrity, independence and sovereignty of the nation; II. Guaranteeing internal security; III. Aiding the civilian population in public needs....<sup>949</sup>

The Organic Law does not establish the defence and respect of concepts like freedom and justice. It focuses on the practical aspect of the general missions, but it does not focus on any axiological principles. The only secondary framework (hierarchically below the Mexican constitution), that establishes certain principles is the Code of Conduct for the Public Servants of the Mexican Army and Aerial Force. This code bases such principles on the Code of Ethics for the Public Servants of the Federal Public Administration, which, as its title implies, establishes general principles that were originally planned for administrative positions, not for the armed personnel. Here lays the importance to reform the Code of Conduct for the Public Servants of the Mexican Army and Aerial Force, and establish principles directed specifically towards their behaviour during armed operations and interaction with civilians. It should also be noted that the Code of Conduct establishes among its principles the need for the soldiers to “have a compromise and perform their actions for the civilians”<sup>950</sup> This principle states the following:

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<sup>948</sup> Innere Führung (n 544) Appendix 1 Guideline 2

<sup>949</sup> Mexican Army and Aerial Force Organic Law (n 941) art 1

<sup>950</sup> Code of Conduct for the Public Servants of the Mexican Army and Aerial Force 2008 (MEX), principle 8

Public servants of the Mexican Army and Aerial Force have the obligation of offering the citizens a fair, polite and equal treatment with the goal of inspiring their confidence, creditability and respect, manifesting that serving is a permanent compromise that the State has conferred to the ones who have the privilege of being part of the Federal Public Administration.<sup>951</sup>

*We encounter a problem here, as the current legislation in Mexico does not put the soldier in the same level as a civilian. Restructuring the concepts used in the Mexican provisions would improve the relation between the status of the army and civilians.*

The principle in Mexico shows the way in which the armed personnel view themselves compared with civilians, as it does not encourage the mentality of “the citizen in uniform” but describes them as members of an elite with an obligation to serve and treat with dignity the civilians, although it does not consider them as part of the same civil society. That is the opposite of what the spirit of the *Innere Führung* had in mind, as the relationship between the armed personnel and society is horizontal and not hierarchical. The Mexican legislation must avoid establishing a hierarchical structure and remove words like “privilege”<sup>952</sup> of the code of conduct, because it entitles segregation from the rest of the citizens in order to be a part of the federal administration. A legal provision that has been considered as part of such privilege is the legal figure known as “war immunity” that has its legal base in article 13 of the Constitution; such article establishes that no person will have immunity, unless it is military immunity for their personnel.<sup>953</sup> If the military had the same rights and obligations as any citizen, then the war immunity would have no reason to exist.

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<sup>951</sup> *ibid*

<sup>952</sup> Code of Conduct of the Public Servants of the National Defence Secretary 2014 (MEX), principles H(a) and J(b) and Code of Conduct for the Public Servants of the Mexican Army and Aerial Force 2008 (MEX), principles 8 and 10

<sup>953</sup> Political Constitution of the United Mexican States 2015 (MEX), article 13: “...No person or corporation can have immunity....the war immunity for crimes and misconducts against military discipline will prevail, but in no case can the military tribunals extend their jurisdiction over persons that do not belong to the army. When a civilian is involved in a crime or misconduct of military nature, the correspondent civilian authority will know of the case”.

#### 6.1.4 The Military Commissioner in Germany and the Ombudsman in Mexico

All German citizens over 35 years old can apply for this role, and since 1990 it is not compulsory for them to have served in the armed forces.<sup>954</sup> As it has been explained,<sup>955</sup> this figure holds a special place in the German State, because he is not considered a member of the Bundestag but neither is he considered a member of the Executive, as his position is situated between both powers, making a statement of independence from them.<sup>956</sup> The Commissioner is elected throughout a secret voting session of the members of the Bundestag for a 5 year period. The German Basic Law establishes his main function:

##### Article 45b (Parliamentary Commissioner for the Armed Forces)

A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary oversight over the Armed Forces. Details shall be regulated by a federal law.

The Commissioner's duties can be divided in two sections: 1) guarding the wellbeing of the basic rights from the armed personnel; and 2) guarding the fulfilment of the principles contained in the *Innere Führung*.<sup>957</sup> These duties mean that the commissioner is both in charge of guarding human rights inside the army, and also outside, on the relationship between the army and civilians (this does not mean that civilians can lodge a complaint against the commissioner for human rights abuses, as his role is to be a link between the army and civil society). Another fundamental function of the Commissioner is to serve as a specialised ombudsman in the armed forces, where the personnel, independently of their rank, can contact him directly and make a petition whose nature can be administrative, practical or personal.<sup>958</sup> He can also request any information needed for investigations from the different administrative authorities; plus, he scrutinises various details from the Federal Ministry of Defence, including personnel and offices. Finally, he can issue recommendations and proposals, which are not compulsory, but experience has

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<sup>954</sup> German Bundestag, "The Parliamentary Commissioner for the Armed Forces of the German Bundestag" (*Deutscher Bundestag*, April 2012), <https://www.btg-bestellservice.de/pdf/80193000.pdf>, accessed 8 July 2015.

<sup>955</sup> "Backgrounder – Security Sector Governance and Reform, *Military Ombudsman*" (Geneva Centre for the Democratic Control of Armed Forces 2006)

<sup>956</sup> *ibid*

<sup>957</sup> *ibid*

<sup>958</sup> German Bundestag (n 954)

shown that the independence of such figures has had a positive effect on the behaviour of armed personnel and commands.<sup>959</sup>

#### The Mexican Human Rights Commission President

The main attributions of the Human Rights Commission President (which is the name given to the Ombudsman in Mexico), are established on the Mexican Constitution in its article 102B, which states:

The President...who will also be president of the Consulting Council, will be elected in the same terms of last paragraph (by two thirds of the Senators Chamber, or when these are not present, by the Permanent Commission of the Union Congress)....(the President), will present an annual report of activities upon the Congress Chambers...

It can be established that the figure of the Parliamentary Commissioner for the Armed Forces in Germany and the Human Rights National Commission (HRNC) President in Mexico hold few coincidences, as both figures have very different scopes and obligations. The Commission website states the following concerning the function of the President:

As a result of the investigations done by the general inspection offices, the President of the HRNC will approve and issue public recommendations and will formulate the proposals needed to achieve a better protection of human rights in the country<sup>960</sup>

The former statement reveals a much more administrative role for the President, who performs more as a representative or the inspection officials whose role is to investigate the complaints received. The Second Inspection Office is the one that handles complaints attributed to the National Defence Secretary, among other secretaries, and it consists of a director, a secretary and two general directors.<sup>961</sup> There is no more information on the functions of this office regarding the military.

*From the analysis of this section, it has been found that the current figure of the Ombudsman in Mexico does not have access inside the military headquarters and does not have any accountability powers over the army. In order to solve this issue, the creation of a military ombudsman is suggested, as this would improve the*

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<sup>959</sup> *ibid*

<sup>960</sup> "Structure" (*Mexican National Commission of Human Rights*)  
<<http://www.cndh.org.mx/Estructura>> accessed 10 July 2015

<sup>961</sup> *ibid*



*conditions of the soldiers and strengthen the faculties of society to protect itself against human rights abuses*

The current President of the National Commission of Human Rights acts as the head of the Commission as an institution, so a direct relationship between the common citizen and him does not exist at the moment; this is also the same case with the army. The creation of an ombudsman that works within the legislative power but is independent from any State power is needed, in order to improve communication between the military processed personnel and the National Defence Secretary Commission in the Federal Congress. The current constitution grants independence to the current Human Rights Commission,<sup>962</sup> but its president and administration panel is only chosen by two thirds of the legislators. This does not include civilian organisations which could be a counterpart to the interests of the Chamber of Deputies. Therefore, political interests tend to be involved in the process of selecting the candidates to front the Human Rights Commission.

The proposed figure would also serve as a link between the army and the Human Rights Commission in Congress, as an independent figure would be an ideal link between the National Defence Secretary and the legislative power. This would be beneficial in order to create proper mechanisms of accountability and publicity that public hearings in the Congress of the Union can provide to society, and would also benefit the army itself, as the ombudsman would also have the function to attend complaints from the armed personnel.

#### **6.1.5 The rights of the military personnel in Germany and Mexico**

The German framework in which this concept is based on is the Law on the Rights and Duties of Soldiers, whose section on the Obligations establishes that they will have the same rights and duties as any citizen.<sup>963</sup> Section 4 also establishes that every order followed by the soldiers must be subjected to international and domestic laws and regulations.<sup>964</sup> The act of establishing in a clear way that the soldiers have the same rights as any citizen entitles them to all the constitutional and international rights, which allows the way to channel such complaints through any legal instances. In the case of the Mexican legislation, the large number of codes and internal regulations in which the concepts about the

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<sup>962</sup> Political Constitution of the United Mexican States 2016 (MEX) art 102B

<sup>963</sup> Civic Rights of the Soldier (n 566) sect 6

<sup>964</sup> Ibid, sect 6 (4)

soldiers' rights are distributed makes it highly challenging to make a comparison. In spite of the former problem, various provisions have been selected:

The Mexican Military Justice Code's article 119 fraction VI establishes the absence of liability for a soldier who follows an illegal order if he does not have knowledge of such illegality, although the same provision mentions that the unlawfulness of such order must not be *notorious*,<sup>965</sup> which is used again in a vague form (and brings to memory the discussion of topics like the concept of "reasonableness" in the Northern Ireland emergency regime<sup>966</sup>). Article 294 of the Military Justice Code also establishes the penalty for the superior who gives an order that might harm a soldier while performing his duties.<sup>967</sup> This is again a concept that lacks clarity and constitutes a problem for the personnel to establish their innocence if they follow an unlawful order. Apart from these provisions, the rest of the frameworks and regulations are focused on the soldiers' duties (Code of Conduct of the Public Servants of the National Defence Secretary, and the General Regulation of Military Duties).

*From the discussion in this section, it is clear that there is both a lack of clarity and a defined structure for both the rights and duties of the soldiers in Mexico. Developing a legal framework specialised in the rights and duties of the soldiers in Mexico would improve their current conditions*

The current legislation about rights and duties of the armed personnel in Mexico is divided into different frameworks and regulations. This does not allow a clear access to the different provisions. Also, the laws that impose duties are highly unbalanced with the ones that grant rights. It is fundamental to restructure the provisions into one single framework, which should also be referred in the Political Constitution in order to provide both the army and society with constitutional resources to reference the potential single framework. This framework should be structured like the German Law on the Rights and Duties of Soldiers, as this framework is clearly defined, and establishes both rights and duties into structured chapters. Finally, in order to provide the soldiers with a wide range of rights and

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<sup>965</sup> Military Justice Code 2014 (MEX) art 119-VI

<sup>966</sup> *Fox, Campbell and Hartley v The United Kingdom* (n 29) [30], [31], [32]

<sup>967</sup> The article states that there will be a penalty of four months of prison for the superior that gives an order to an inferior, which among other descriptions, might "...cause (the inferior), to engage in obligations that might be harmful to the performance of its duties". (in chapter about Germany)

legal resources, these should be granted the same status as common civilians and have the same social aim as the “citizen in uniform” figure in Germany.

One of the most important contemporary features of democratic military systems is the power of the soldiers to file a complaint if they consider that their rights have been violated, or is they are unsatisfied with any aspect of their military life. The German Basic Law is the constitutional foundation for this system in Germany,<sup>968</sup> as article 19(4) establishes the right of every citizen to recourse to courts if their rights have been violated, and since the soldiers are considered citizens in uniform, the same principle applies to them. The Law on the Rights and Duties of Soldiers establishes in its section 34 that the framework which describes the process to issue complaints for the military personnel is the *German Military Complaints Regulations* (WBO). As it has been established,<sup>969</sup> section 1 of this framework states the rights of armed personnel to file complaints,<sup>970</sup> both against particulars and the Federal Defence Institutions. Section 2 protects the soldier against potential backlash for issuing a complaint,<sup>971</sup> as it states that no repercussions will be taken against a soldier for lodging a complaint which has not been properly founded.<sup>972</sup> This gives adequate protection to the armed personnel’s wellbeing in the barracks’ internal life, and also protects them against abuse from their superiors. The Parliamentary Commissioner for the Armed Forces takes a fundamental role here too, as one of his main functions is to collect and attend the petitions of the personnel inside the army.

On the other hand, the justice system in Mexico has not developed a mechanism that will safeguard the rights of the soldiers that lodge a complaint. The Military Justice Code establishes in its article 342 that unfounded complaints will be subjected to a punishment consisting of prison, even going to the extreme of being arrested for not putting their complaints through the right channels.<sup>973</sup> The paths of

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<sup>968</sup> Civic Rights of the Soldier (n 566) sect 6

<sup>969</sup> German Military Complaints Regulations 2009 (GER) sect 1

<sup>970</sup> “...the rights to lodge a complaint if they believe that they have been treated wrongly by superiors or by Bundeswehr agencies or have been harmed as a result of breach of duty by fellow soldiers.”

<sup>971</sup> This is the prohibition from reprehending or taking any kind of actions that might put a military in disadvantaged for having lodged a complaint without the proper fundament.

<sup>972</sup> German Military Complaints Regulations 2009 (GER) sect 2

<sup>973</sup> Military Justice Code 2012 (MEX)

lodging complaints are hierarchical and are solved within the same structure inside the army, as the General Ordinance of the Army regulation establishes in its article 161<sup>974</sup> that every soldier needs to appoint all their requests and complaints to their immediate superior. In case that this complaint is lodged against their superior, they should report it to the next member above in the hierarchical scale.

*Currently, there are no current adequate mechanisms for the soldiers to lodge complaints and petitions through channels that will guarantee access to justice. This comparison suggests that the creation of a military ombudsman and parallel reforms in the Political Constitution and military frameworks would improve their current conditions*

The current path to process complaints in Mexico does not guarantee efficient access to justice and has no mechanisms for independence either. An external figure that is both independent from the executive and legislative powers would be appropriate in order to reform the status of the soldiers' rights according to democratic standards. This would also require the creation of a framework that establishes the rights and duties of the soldiers, which would include as a prominent feature a democratic and independent system of filing complaints that would guarantee efficient access to justice, and safeguard the armed personnel's physical and moral integrity.

## **6.2 The emergency regime in Northern Ireland and the deployment of British troops, compared to the legal justification in Mexico to deploy the armed forces in domestic tasks against organised crime**

It is appropriate to start this comparison by referring to the background for the deployment of the armed forces both in Northern Ireland and in Mexico, as there are important similarities in both cases.

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Article 342.- Those who state or deliver to their superiors, either by word or in a written way, resources, petitions, complaints or claims regarding issues relatives to the service, military position, or personal interest of the ones complaining, will be punished:

I.- If they use fake data or statements to make their fundaments, eleven months of prison;

II.- if they do it by physical statements, whether it is one representing others, or two or more reunited, fourth months of prison, and

III.- if they do not do through the channels allowed by law, unless it was necessarily, they will be subjected to sixteen days of prison

<sup>974</sup> General Ordinance of the Army 1912 (MEX)

In the case of Northern Ireland, then-prime minister Chichester-Clark expressed that, as the violence in Londonderry in August of 1969 increased, he had no other option but to take emergency measures. The result was the British government deploying troops in Northern Irish territory, the issuing of the Emergency Provisions Act 1973, and the Prevention of Terrorism (Temporary Provisions) Act 1974. Schedule 3 Supplemental Provisions for Sections 1 to 8, Part I(3) was the foundation for the power given to the army, as the supplemental provision states the following: “(3) In Northern Ireland members of Her Majesty's Forces may perform such functions conferred on examining officers as are specified in the order.”

In the case of Mexico, the foundation for the deployment of the armed forces is a presidential decree issued by ex-president Felipe Calderon which was published on the Official Diary of the Federation on 17 September 2007. The decree established the creation of a Special Body of the Army and Aerial Force called *Federal Support Special Force Body*.<sup>975</sup> Ex-president Calderon established on the same decree the legal grounds in which he justified his decision, these being articles 89 fraction I and VI of the Political Constitution of the United Mexican States; articles 1 fraction II, and 14 fraction IX of the Organic Law of the Mexican Army and Aerial Force; and articles 13 and 29 of the Organic Law of the Federal Public Administration.<sup>976</sup> Apart from the previous provisions, an isolated thesis (criteria established by the Supreme Court that does not have the status of jurisprudence), established that the aid from the armed forces to the civilian authorities is indeed constitutional, as:

...it is not essential to declare the suspension of individual guarantees provided for extreme situations in constitutional article 29 for the intervention of the army, navy and aerial force, because reality can generate an infinite number of situations that would not justify the state of emergency, but with the

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<sup>975</sup> Official Diary of the Federation (n 281)

<sup>976</sup> 1) Political Constitution of the United Mexican States 2015 (MEX), article 89: “The faculties and obligations of the President are the following.... I. Issuing and executing the laws that are legislated by the Union Congress, guarding its exact observance in the administrative sphere..... VI. Preserving national security, in the respective legal body's terms, and having the permanent Armed Force, meaning the Army and Aerial Force, available for matters of interior security and exterior defence of the Federation.”

2) Organic Law of the Mexican Army and Aerial Force 2012 (MEX), article 1: “The Mexican Army and Aerial Force are permanent armed institutions which have the following general missions..... II. Guaranteeing internal safety.” Article 14: “The faculties of the Supreme Command are..... IX. Authorising the creation of new units for the Army and Aerial Force; new arms and services; new settlements for military education or special bodies.”

threat of an upscale of danger, the use of force which the Mexican State possess would be necessary, always subjecting itself to the constitutional and legal current provisions.<sup>977</sup>

*There is a lack of clarity in the Mexican legislation regarding the powers of the president in order to deploy the army, concerning the role of the legislative. This research has found that reforming the referred provisions would give a clear structure that would legitimise the legal status to the army in constitutional terms*

The social context between Northern Ireland and Mexico is referred for two main reasons:

1) The deployment of the armed forces in Northern Ireland was the response to the events in Londonderry in August 1969. On the other hand, in Mexico the decision to deploy the army did not constitute an immediate response to an attack or emergency situation, but this policy represented a central part of the security strategy of Calderon's administration. The first deployment of the armed forces was in the state of Michoacán, but the troops gradually spread across various points in the country.<sup>978</sup>

2) Northern Ireland did not have a constitutional legal hierarchical order; therefore, the supplemental provision contained in the Prevention of Terrorism (Temporary Provisions) Act 1974 did not constitute any breach of legality. In the case of Mexico, a chapter on the armed forces is not included in a structured way, so the use given by the President is not defined but only *inferred*, as article 89 establishes the faculty of the executive to use the armed forces to protect internal safety, but does not establish the kinds of attributions that the armed personnel should have in the potential deployments. We can see the need for a constitutional restructuring that would develop a defined structure on the use of the armed forces for emergency situations or as part of a security strategy, as a state of emergency has never been officially declared in Mexico. The current reform of constitutional article 29 which establishes a mechanism for creating a state of emergency is welcomed, although it is still on an early stage to measure its success. Another fact that proves the importance of establishing a well-defined emergency powers structure is the ability to establish different kinds of emergencies; as Gross stated, armed conflicts such as terrorism and war are not the only emergencies, but also

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<sup>977</sup> Supreme Court of Justice of the Nation (MEX), Thesis: P/J 38/2000 (April 2000)

<sup>978</sup> Official Residence (n 3)

economic crises and natural disasters.<sup>979</sup> For this reason, contemporary emergency powers body should contain different categorizations of emergencies and the appropriate response for each of them (a suggestion could be categorising them by levels, depending on the level of threat they posed for society).

Finally, the isolated thesis issued by the Supreme Court should be derogated as it does not define the limits which separate democratic order from a state of emergency in order to use the army. The criteria is also contradictory because it establishes the power to use the armed forces without following the strict criteria of constitutional article 29, while mentioning that the State must always follow the constitutional provisions in order to use the armed forces.

### **6.2.1 Powers of arrest, and stop and search in Northern Ireland and Mexico**

The EPA constituted the base for the emergency regime in Northern Ireland, as the previous framework (The Special Powers Act) was repealed by the EPA in order to award the British government the power of direct rule and apply special provisions to what they considered a state of emergency. The EPA was an act that was developed through the normal legislative process in Parliament, and subjected to periodical reviews. There are certain key points which are the subject of comparison with the current Mexican legislation, because they contained special provisions that established highly strong enforcement toward suspects of terrorism. The provisions that are relevant for this comparison are section 12 (which established the right of Her Majesty's Forces to arrest)<sup>980</sup> and section 16 (stop and search).<sup>981</sup> Section 12 has been criticised for being subjective; Korff established that

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<sup>979</sup> O Gross (n 314) 6

<sup>980</sup> Emergency Provisions Act 1973 (NI), Section 12.--(1) A member of Her Majesty's Forces on duty may arrest without warrant, and detain for not more than four hours, a person whom he suspects of committing, having committed or being about to commit any offence.

(2) A person effecting an arrest under this section complies with any rule of law requiring him to state the ground of arrest if he states that he is effecting the arrest as a member of Her Majesty's Forces.

(3) For the purpose of arresting a person under this section a member of Her Majesty's Forces may enter and search any premises or other place where that person is or, if that person is suspected of being a terrorist or of having committed an offence involving the use or possession of an explosive, explosive substance or firearm, where that person is suspected of being.

<sup>981</sup> Emergency Provisions Act 1973 (NI), Section 16.--(1) Any member of Her Majesty's Forces on duty or any constable may stop and question any person for the purpose of ascertaining that person's identity and movements and what he knows concerning any

the phrasing of the sentence “a person whom he suspects” instead of phrasing it as “a person reasonably suspected” goes beyond the objective elements that should be part of a lawful detention.<sup>982</sup> On the subject of search, certain practices as house-to-house search operatives became common, and up until 1976, police build files on every citizen that lived in areas considered as Republican.<sup>983</sup>

By its part, the current Mexican constitution does not explicitly establish the power of the armed forces to arrest, and stop and search. However, the Military Justice Code has been reformed and now the military judges have the faculty to issue search warrants on private addresses and intervening private communications with the authorization of military judges.<sup>984</sup> A comparison cannot be made using a strict method based on a positivist approach, but the “intermediate theory”<sup>985</sup> would be more appropriate to use, if the cultural elements and the aims that were behind the frameworks are taken into account. For this reason the first code that was analysed is the Political Constitution, as this is the highest legal framework in a hierarchical scale in Mexico.

As the powers of the soldiers are not established or referred in the constitution, the only legal body that establishes certain parameters and limits is the *Manual for the Use of Force of common application to all the Armed Forces*. This code has the status of a regulation and is in a lower hierarchical order to the Political Constitution and to the federal secondary frameworks. This manual is the base for establishing the use of force from the armed forces, and its Chapter I paragraph 1 establishes that Use of Force is to be conceived as: “the use of techniques, tactics, methods and armament that the armed forces personnel will use and perform in order to control, repeal or neutralize acts of non-aggressive, aggressive or severe aggressive resistance”.<sup>986</sup> This section implies that the use of force will only be applied as a response to aggressions. It should be noted that

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recent explosion or any other incident endangering life or concerning any person killed or injured in any such explosion or incident.

<sup>982</sup> D Korff, *The Diplock Courts in Northern Ireland: A Fair Trial?* (Netherlands Institute of Human Rights, Utrecht 1984) 29

<sup>983</sup> K Boyle, T Hadden, P Hillyard, “Emergency Powers: Ten Years On” (1979-1980) 174 *Fortnight* 4, 6

<sup>984</sup> Military Justice Code 2016 (MEX) arts 248 fractions II and III

<sup>985</sup> M Van Hoecke (n 28) 185

<sup>986</sup> Manual for the Use of Force, of common application to all the Armed Forces 2014 (MEX) [1]



paragraph 2 section D establishes the “rational need for defence”, which describes this concept as “the performance of the armed personnel, after having done the corresponding analysis about the attitude and characteristics of the aggressor, as well as their own capacities, in order to determine the proportionality of the use of force”.<sup>987</sup> This concept is closely similar to the “reasonable conviction” or “a reasonable ground for suspicion”, which was the subject of debate in Northern Ireland.

Apart from the recent reforms to the Military Justice Code, the Federal Law Against Organised Crime in Mexico also contains similarities with the Emergency Provisions Act 1973. The main goal of both frameworks was to create a special legislation against what the State considered as an internal threat caused by non-State actors. Both laws hold highly repressive provisions of enforcement which were targeted at specific groups, although the provisions in both regulations are open for different interpretations. In the case of the Federal Law Against Organised Crime, the provision that exposes the high level of enforcement that gives a broad margin of arrest to the security forces is article 2, which considers as organised crime the act of *organising* to perform one or various crimes which are on the list of behaviours considered as organised crime.<sup>988</sup> This provision is comparable with the behaviour of the security forces in Northern Ireland, when they arrested or in some cases<sup>989</sup>, exercised lethal force against citizens who were considered suspects,<sup>990</sup> as the frameworks also allowed the use of force just for having a “reasonable” suspicion about the suspects.<sup>991</sup> In the case of the Mexican legislation, the concept of “organising” is not clearly defined, and the crimes for which a person can be given the status of member of an organised crime group are subjected to high sanctions in the Federal Criminal Code.

*There have been proven allegations of the misuse of force by elements of the army in Mexico since the current security strategy started. The analysis made in*

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<sup>987</sup> *ibid* [2(d)]

<sup>988</sup> Federal Law Against Organised Crime 2014 (MEX), article 2.- “When three or more persons organise themselves to perform, in a permanent or repeated way, conducts that by themselves or united to others, have as an aim or result performing one or some of the following crimes, which be sanctioned by that only fact, as members of organised crime....”

<sup>989</sup> *Hugh Jordan v The United Kingdom* (n 831)

<sup>990</sup> *McCann and Others v The United Kingdom* (n 811) [214]

<sup>991</sup> *Fox, Campbell and Hartley v The United Kingdom* (n 29) [30], [31], [32]

*this research concludes that establishing defined limits for the use of force in the Manual for the Use of Force of common application to all the Armed Forces, and also at a constitutional level, would subject the armed forces to stronger accountability mechanisms. The status of an organised crime member should also be reformed in order to establish appropriate limits for the prosecution for this crime.*

The principles established in the Manual for the Use of Force have been violated in numerous occasions by the Mexican army. One of the most recent cases (the *Tlatlaya* massacre), was investigated by the *Miguel Agustín Pro Juárez Human Rights Centre*, who established that the army had orders which are similar to the Northern Irish *shoot-to-kill* policy.<sup>992</sup> The order given to the Mexican soldiers by their superior stated that “the troops must operate in the night in a massive way, and during the day they should reduce their activities, in order to *demolish* criminals at late night, because most of the crimes are committed during such period of the day”.<sup>993</sup> This shows that there is a semi-official strategy that includes using lethal force against the population, as it has not been established in that way by the federal government, but those rules have been structured within the army. The constitution should textually establish the obligations of the army, which need to be consistent with the international treaties that Mexico has signed.

The use of force should also be defined with a clear structure. To clarify this concept, it is relevant to cite the definition that the ECHR gave on the *McCann and Others v The United Kingdom* case that “...the reasonableness of the use of force has to be decided on the basis of the facts which the user of the force honestly believed to exist: this involves the subjective test as to what the user believed and an objective test as to whether he had reasonable grounds for that belief”.<sup>994</sup> This implies that lethal use of force must never be used as a common practice, contrary to what the army instructions in the *Tlatlaya* case ordered. In the case of the description used in the Federal Law Against Organised Crime, the description should be reformed and contain descriptive elements of concrete actions, which should go beyond the act of mere “organising”.

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<sup>992</sup> K Asmal (n 819) [134]

<sup>993</sup> Miguel Agustín Pro Juárez Human Rights Centre, *A Year From Tlatlaya: the Order was to Demolish* (Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C., Mexico City, June 2015) 20

<sup>994</sup> *McCann and Others v The United Kingdom* (n 811) [133]

### 6.2.2 Internment in Northern Ireland and its similarities with the “arraigo” model in Mexico

There are important differences between the figure of internment in Northern Ireland and the figure of *arraigo* in Mexico. However, both share a common goal in mind at the moment of being developed: the withholding of a suspect until the investigators gather enough evidence to prosecute him.

As it has been established in the previous chapter,<sup>995</sup> Internment was created for the purpose of detaining a suspect without a trial in order to prevent their escape and gather intelligence. The detained citizens would be taken to the headquarters of the security forces, where they suffered diverse human rights abuses at the hands of these. The most common form of mistreatment was known as “the 5 techniques” (sleep deprivation, starvation diets, white noise, hooding, and the enforcement of spread angling against a wall for hours<sup>996</sup>). The whole purpose of internment was to decrease the paramilitary violence by enforcing stronger methods of repression against suspects of terrorism. At a legal level, the EPA 1973<sup>997</sup> provided the military with powers of arrest and detention without a warrant to anyone that they *suspected* of committing any crime. This resulted in accusations of torture and degrading treatment, especially the procedure known as “the five techniques”.<sup>998</sup>

In the case of Mexico, the legal concept of *arraigo* is one of the most debated reforms aimed as part of the current security strategy. This figure consists of the detention of a person in its own private address or a designed place, for the length of 40 days (which can be extended up until 80 if a judge concedes the warrant).<sup>999</sup> According to the Human Rights National Commission, between 2008 and 2010 around 120 complaints related to *arraigo* were presented. 38% were related to unlawful detention, 41% with cases of torture and/or degrading treatment and 26% presented both an unlawful detention and torture.<sup>1000</sup> The legal base of this

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<sup>995</sup> The National Civil Rights Archive (n 697)

<sup>996</sup> TP Coogan (n 663) 126

<sup>997</sup> Emergency Provisions Act (NI) 1973, section 12

<sup>998</sup> TP Coogan (n 663) 126

<sup>999</sup> Centre of Social and Public Opinion Studies, *Judicial Arraigo: general facts, context and debate topics* (LXI Legislature of the Chamber of Deputies, November 2011) 2

<sup>1000</sup> *ibid* 3

figure is found in Constitutional article 16, which establishes the power of the investigators and security forces to withhold a person who is considered a suspect of organised crime, in order to give the authorities time to investigate without the concern of the suspect's escape.<sup>1001</sup> The next framework in the hierarchical order that establishes this faculty is article 133Bis of the Federal Code of Criminal Procedures.

The Chamber of Deputies has established that, added to the fact that academics have considered the participation of the armed forces in *arraigo* cases as inadequate, there have been different occasions in which suspects have been withhold in military facilities.<sup>1002</sup> This violates an essential constitutional provision (article 21), which establishes that only the Public Ministry has the faculty to investigate crimes and exercising criminal action (making a petition to a judge to submit a person to trial).

*The figure of "arraigo" in Mexico has been misused by both the army and the civilian security forces, engaging in a vast number of human rights abuses. It can be established that abolishing this figure would improve the democratic order of federal investigations against suspects of organised crime*

As it has been previously discussed,<sup>1003</sup> the figure of internment in Northern Ireland was not a successful method to tackle the paramilitaries, as it damaged the legitimacy of the security forces and increased the animosity between the British government and the Northern Irish population; hence, its derogation in 1975. The figure of internment did not reduce the violence, but provoked the increase of murders and terrorist acts,<sup>1004</sup> making it not only morally unacceptable, but ultimately ineffective for the government's goals.<sup>1005</sup>

In the case of Mexico, the figure of *arraigo* has not proved to be successful either, as the violence related to organised crime has not decreased as a result of such policy. This has also damaged the reputation of the security institutions, as the armed forces have been accused of breaching their faculties by taking part in the

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<sup>1001</sup> Political Constitution of the United Mexican States 2015 (MEX) art 16

<sup>1002</sup> Centre of Social and Public Opinion Studies (n 999) 9

<sup>1003</sup> RJ Spjut (n 711) 718-719

<sup>1004</sup> University of Westminster (n 703)

<sup>1005</sup> D. Lowry, "Internment: Detention Without Trial In Northern Ireland" (1976) 5(3) *Human Rights* 261, 323

detention of various suspects.<sup>1006</sup> The authorities in charge of the investigations need to have enough elements for exercising criminal action as soon as possible, and it should not take more than the standard number of days for retaining a person suspected of committing ordinary crimes (48 hours, established by article 10 fraction IX of the Federal Code for Criminal Procedures) to have enough elements for prosecution. External human rights visitors should also be provided to detained persons in order to guarantee that their wellbeing is respected during this stage. Finally, the armed forces should abstain from detaining civilians, as it is not their function, and its investigative organ (the military Public Ministry) is currently dedicated to investigate crimes exclusively of a strictly military nature.

### **6.2.3 The State's duty to investigate deaths in which an official is involved in Northern Ireland and Mexico**

In *McCann v UK*, the ECtHR established that the State failed to protect article 2 (right to life) of the ECHR and addressed that “the State must provide an effective ex post facto procedure for establishing the facts surrounding a killing by agents of the State through an independent judicial process”.<sup>1007</sup> The Court also referenced article 9 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,<sup>1008</sup> to sustain their pronouncement.

In the case of *Radilla Pacheco v Mexico*, the IACtHR established that the Mexican State had to reform their laws to be in accordance with the American Convention in the subject of criminal military jurisdiction, and to create a resource to challenge the competence of the mentioned military jurisdiction.<sup>1009</sup> The Court established the direct responsibility of the State over their officers, as they established that the soldiers that had detained Radilla Pacheco were in charge of his rights’ protection. Therefore, due to the fact that the victim disappeared under

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<sup>1006</sup> Human Rights Watch (n 240) 63

<sup>1007</sup> *McCann and Others v The United Kingdom* (n 811) [157]

<sup>1008</sup> Article 9. There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

<sup>1009</sup> *Rosendo Radilla v Mexico* (n 229) [337]-[342]

their custody, the State infringed their duty to prevent violations to human treatment and life.<sup>1010</sup>

In conclusion, it can be established that both the UK and the Mexican States violated the rights of citizens when civilians suffered severe human rights abuses at the hands of their officers. They were responsible of not protecting the citizens and not establishing effective remedies to the victims and their relatives to access justice and punish the responsible. Only through the proposed reforms, the victims in Mexico will have access to effective justice, and like the IACtHR has established, the State would have the obligation to remove the *de facto* and *de jure* circumstances that generate impunity.<sup>1011</sup>

#### **6.2.4 Final considerations of the comparative study**

This comparison study between Mexico and Germany for its post-WWII institutions, and Mexico and Northern Ireland for the legal provisions and figures established in the emergency regime has been successfully developed. The use of an *intermediate* methodology that takes into account social and cultural factors was determinant to find correlations between the countries used for the comparison with Mexico; the functionality of the figures discussed has also been established using the intermediate theory.

There is an essential point that should be addressed: both the comparisons with Germany and Northern Ireland provide enough evidence that establishes the need to develop a deep reform and restructure the Mexican Political Constitution. The first problem encountered was the lack of a coherent structure among the different provisions that serve as the ground for the correct functionality of the armed forces, its institutions and its relationship with the State. This makes the task of establishing ordered and clear frameworks, concerning topics like accountability of the armed forces, highly complicated. Also, the vast quantity of secondary frameworks and internal regulations constitute an obstacle to establish a set of provisions dedicated to the current security strategy that would be easier to access for victims seeking justice.

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<sup>1010</sup> *Rosendo Radilla v Mexico* (n 229) [153]-[154]

<sup>1011</sup> *Anzualdo Castro v Peru* (Judgement) Inter-American Court of Human Rights Series C No 202 (22 September 2009) [125]

Regarding the concept of *dignity*, the Mexican Political Constitution does contain a similar idea in its article 1,<sup>1012</sup> but it only refers to *human dignity* as a right that should be protected from discrimination. To establish this concept as the centre of all legal protection, a provision with the same spirit as article 1(1) of the German Basic Law<sup>1013</sup> should be established in the Mexican constitution. The proposed provision should not necessarily be identical to one established in the German Basic Law because, as it has been previously addressed, the concept of *dignity* does not come from a purely textual approach but from the premise that “all law has to emanate from the individual’s status as a legal subject”.<sup>1014</sup> So the first step for the Mexican legislation is to consider the citizen as the central object of the juridical order, where all the legal frameworks would have as their main goal the protection of his human rights.

Having addressed this point, the degree of independence and freedom of conscience that the German military has achieved can be implemented in the Mexican military, as there is no conflict of interests with between the soldiers and the citizens. Providing legal recognition to the soldiers as full-citizens would increase the trust and legitimacy of the institutions. This recognition, alongside a new system that allows the soldiers to lodge complaints without their superiors acting as intermediaries, would provide the soldiers with a strong system of protection to their fundamental rights. Therefore, the most important adaptation is to grant the Mexican soldiers the status of “citizens in uniform”.

It was also pointed that the inclusion of a military ombudsman dedicated to the armed forces is essential, although an adequate constitutional ground needs to be previously developed in order to protect his independence and outline his attributions. Along the creation of an ombudsman, parameters regarding clear limits for the armed forces also need to be addressed in the constitution, as currently the provisions dedicated to them are focused on their administrative functions and their submission to the President. This dependence on the executive should also be

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<sup>1012</sup> Political Constitution of the United Mexican States 2016 (MEX) art 1: “....Ay discrimination motivated by ethnic or national origin, gender, age, disabilities, social condition, health conditions, religion, opinion, sexual preference, civil status or any other that threatens human dignity and has as a goal to nullify or diminish the rights and freedoms or persons, is forbidden”.

<sup>1013</sup> “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority”

<sup>1014</sup> C Enders (n 537) 8

reformed in favour of a truly independent structure and a strong control of civilian figures, not only the legislative and the government. The status of the armed personnel should also be focused on their own rights as citizens and members of an institution. It is essential to create a democratic internal life in the army and establish a system to guard the issues and petitions of the soldiers, not only in the current context when the troops are indefinitely deployed, but also as a permanent structure which should be detailed in the Political Constitution.

Regarding the current legal regime in Mexico, the attributions of the armed personnel to aid civilian forces in the security policy against organised crime/internal threats, should be structured as part of the proposed constitutional chapter on the armed forces. It is not understandable why the Supreme Court established that the current security issues demand the aid of the military, while at the same time stating that there was no need to officially establish a state of emergency. The emergence of constitutional reforms and dedicated frameworks to the security strategy that would go beyond mere crime descriptions (as the *Federal Law Against Organised Crime* currently does), is needed in order to subject the actors involved to domestic and international standards of accountability. Topics like the use of force are fundamental in any democratic system, whether the armed forces are involved in civilian issues or not, and legal controls for this should not be limited to an internal regulation (*Manual for the Use of Force, of common application to all the Armed Forces*). Their inclusion in the constitutional and military frameworks needs to be developed as soon as possible; the case of soldiers using military facilities to detain suspects of organised crime is one of the prime examples that show the breach of current domestic legal attributes and international standards. It would be highly beneficial if the Mexican legislators worked on establishing measures that have been proved successful and abolish figures like *arraigo*, as this measure has been unsuccessful so far to tackle organised crime.

The Diplock Courts in Northern Ireland cannot be directly compared with the Military Courts in Mexico, because the first ones were employed to try suspects of terrorist activities,<sup>1015</sup> whereas suspects of organised crime are tried in civilian federal courts. However, there is a point of comparison between the current military courts in the cultural elements which both institutions share. The Diplock Courts were considered by the Northern Ireland Rights Assembly as affecting the right to a fair trial because of factors such as the lower standards for the admission of

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<sup>1015</sup> Home Office (n 765)



evidence when compared to ordinary courts, and the fact that confessions were made while *incommunicado*.<sup>1016</sup> In the Mexican case, the civilian courts have jurisdiction in cases where civilians are the victims of human rights abuses by the armed forces, but when human rights are violated within the army, military courts are the only legal resource.

Recently, the IACtHR issued a Resolution of Supervision of Fulfilment of a Sentence from the *Radilla v Mexico* case, in which they established that the Mexican State needs to adopt the adequate reforms to allow the victims of military immunity to have an effective way to challenge military jurisdiction.<sup>1017</sup> Also, the right to a fair trial is violated when the military investigators are still involved in the gathering of evidence of a crime where a civilian is the victim, so civilian authorities should be in charge of all the investigation.<sup>1018</sup> Even though the judgements did not lack transparency in the Diplock Courts, and on the other hand, Mexican military courts have been reluctant to give any details (even to the relatives of the victims), the points being compared are functional, because both courts have proved to be unsuccessful (the Diplock Courts were abolished). Therefore, the methodology of *functionality* was useful in this comparison, as the analysis showed that the absence of publicity in trials favours the violation of the suspects' human rights.

Finally, the cultural element of corruption between the army and Northern Ireland and the armed forces in Mexico is also relevant to the discussion. In Northern Ireland, the Stevens Inquiry determined that there had been collusion between elements of the army, the RUC and the loyalist paramilitaries.<sup>1019</sup> The analysis of the Inquiry is relevant in this comparison, as there have been reports of military personnel being colluded with the drug cartels, proving similarities with the Northern Irish case. The Saville Inquiry was relevant to this comparison, as it established that the abuses from the army increased as time passed and as the emergency provisions lasted for longer. In Mexico, the army has also been involved in the death and torture of civilians during recent events like the *Tlatlaya* case or the disappearance of 43 students in the southern town of Ayotzinapa.

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<sup>1016</sup> Northern Ireland Human Rights Assembly (n 738) 46

<sup>1017</sup> *Radilla Pacheco, Fernandez Ortega and others, and Rosendo Cantu and other v Mexico* (Supervision of fulfilment of sentence 17 April 2015) 2

<sup>1018</sup> *Fernandez Ortega and others v Mexico*, para 177, and *Rosendo Cantu and other v Mexico* [161]

<sup>1019</sup> SJ Stevens (n 689) [2.15]

The security strategy in Mexico needs to be subjected to a deep analysis and a subsequent group of deep legal reforms, from the core legislation (the Political Constitution) to the secondary frameworks and the regulations. As this comparison has established, neither the institutions nor the legal bodies have been adjusted to the current security strategy and the mechanisms of control are highly undeveloped, as civilian society has no way of accessing justice in an efficient way that would affect positively the relation between society and the army. The methodology used in this comparison has allowed identifying successful and unsuccessful institutions and legal frameworks regulating civil-military relations.

## Conclusion

### Civil-military relations in the democratic era

Mexico's current security conflict is vastly broad and can be subjected to diverse analysis; although, for the purpose of developing a deep study on a determined field, this research has focused on the current civil-military crisis regarding human rights abuses. The current context in Mexico has aggravated since this project began in late 2011, as the armed forces have been accused of taking part in extrajudicial killings and torture in different cases, with the *Tlatlaya* and *Ayotzinapa* cases being the most relevant. The development of new theoretical mechanisms of accountability, public scrutiny and control over the armed forces is essential in order to improve the current conditions that have generated a human rights crisis in Mexico since the army was deployed in late 2006.

The Military Justice Code reform of 2014<sup>1020</sup> brought a lot of expectations regarding future investigations that involved human rights abuses by the military. Unfortunately, very few things have changed at a field level and the root of the problem seems to have political, institutional and legal origins. In a recent interview, current National Defence Secretary General Salvador Cienfuegos stated that the armed forces were not going to be subjected to democratic mechanisms of accountability by international human rights organisms regarding the Ayotzinapa case, as he said:

I have been standing in the position that the soldiers should not declare; first of all, because there is no clear pointing to any involvement in the events. We will only give answers to the Mexican ministerial authorities. The covenant that the Government of the Republic signed with the Inter-American Commission (of Human Rights) does not establish anywhere that they can interrogate us. It is not possible; the law does not allow it. It is not clear to me and I cannot allow *my* soldiers –who have not committed any crime until now-, to be questioned. What do they want to know, the soldiers' version? Everything has been declared. I cannot allow the soldiers to be treated like criminals.<sup>1021</sup>

The interview given by Cienfuegos exemplifies contemporary militarism in Mexico. We can infer that the current ideology behind the armed forces is to keep secrecy, hierarchical impunity and reluctance to submit to accountability mechanisms as part of their culture and values. There is another point to be

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<sup>1020</sup> Military Justice Code (n 253).

<sup>1021</sup> ““I cannot allow my soldiers to be questioned, what do they want to know?": Cienfuegos” *Sin Embargo* (Mexico City 6 October 2015) <<http://www.sinembargo.mx/06-10-2015/1509444>> accessed 6 October 2015

discussed here: the Secretary mentions his agreement to be investigated by domestic authorities, but not by international ones. This behaviour is nothing but damaging to the Mexican institutions, as it creates suspicion about the professionalism and impartiality of the domestic justice system. When military officials confront the justice institutions with double standards, they lose legitimacy.

The criticisms on Calderon's security policy have continued through Peña Nieto's administration because the enforcement strategy has not been reformed, and the recent events, especially the *Ayotzinapa*<sup>1022</sup> and *Tlatlaya*<sup>1023</sup> massacres, continued to increase the civil-military conflict and generate more impunity to the army. The level of polarisation between important segments of Mexican society and the government also impacts the way in which civilians interact with the military institutions, especially when the later ones are performing domestic security tasks on a regular basis. As Greenstone established,<sup>1024</sup> differences between society and the military in developing democracies tend to have social and political roots; this is the case of Mexico, as the Ayotzinapa investigation involves the army in the disappearance of students who were political activists. Plus, statements like the ones General Cienfuegos has made leave no room for doubts about the undemocratic interests of the highest officials, which go beyond issues concerning policies and programs. It has been impossible to develop a democratic system of civilian control, as the National Defence Secretary keeps being commanded by a military in functions. This has prevented the Mexican State from achieving what the Council of Europe has defined as "unlimited civilian supremacy over the command of the armed forces".<sup>1025</sup>

This research is as relevant as it was when it began in 2011. When the general context was explained in the first chapter, it was established that the Mexican government has developed its antidrug policy based on a *Supply*

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<sup>1022</sup> "Ayotzinapa Inform II: Progress and new conclusions on the investigation, search and attention to the victims" (*GIEI*) <<http://www.oas.org/es/cidh/actividades/giei/GIEI-InformeAyotzinapa2.pdf>> accessed 9 May 2016

<sup>1023</sup> Miguel Agustin Pro Juarez Human Rights Centre, *A Year From Tlatlaya: the Order was to Demolish* (Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C., Mexico City, June 2015)

<sup>1024</sup> RL Schiff (n 405) 25

<sup>1025</sup> European Commission for Democracy Through Law (n 384) 4

*Reduction* approach,<sup>1026</sup> because the armed forces have been concentrated on reducing the amount of drugs in the streets and arresting the kingpins to decrease the cartel's power. This has proven to be an unsuccessful policy, based on the number of reports about abuses to the National Commission of Human Rights, and the critiques made by international UN officials and the political opposition inside Mexico. It can be inferred, judging by the government's unwillingness to change the security policy that the *supply reduction* operatives will continue indefinitely. With this background in mind, the question that gave birth to this project and the secondary questions are answered:

*What kind of structures and mechanisms can be developed to solve the current crisis regarding civil-military relations in Mexico?*

This research has provided the theoretical background to suggest new institutional and legal models that can be both legislated and introduced as political reforms. First, we can establish that the civil-military conflict is a consequence of the security policy that the Mexican government developed to fight drug cartels which have been defined as organised crime groups.<sup>1027</sup> This has created a confrontation between the official security forces and the drug cartels which has the characteristics of a non-international armed conflict.<sup>1028</sup> With these concepts in mind a comparative legal study has been developed, taking into consideration the Mexican social context and the type of security conflict established in chapters I and II.

The analysis of Mexican militarism and the case studies done in chapter III have displayed the legal gaps that exist within the justice system, but they have also shown a lack of political will and institutional commitment with the victims and their relatives. Military investigators are not trained to handle civilian cases, as their relationship with the citizens (the ones who have a direct interest in the case) that question them about their relatives who have been victims of human rights abuses or the cases themselves is rude, unprofessional and intimidating at best,<sup>1029</sup> and aggressive or criminal at worst.<sup>1030</sup> This behaviour reveals an institution that has

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<sup>1026</sup> AR Kleiman, P Caulkins, A Hawken (n 54) 44

<sup>1027</sup> Convention against Transnational Organized Crime (n 40)

<sup>1028</sup> C Greenwood (n 139) 54

<sup>1029</sup> Human Rights Watch (n 4) 47

<sup>1030</sup> *ibid* 39

been isolated from civil society for decades, which the current security strategy has forced them to open their headquarters and files to civilians who are accusing them of severe violations.

There are two points in which this research has provided potential solutions for this issue: the first point is related to the jurisdiction. Investigations in which fundamental rights are violated need to be investigated and tried by civilian institutions. The German example showed that when the armed forces are subjected to civilian jurisdictions through the entirety of the case, from the moment in which the complaint is received through the whole investigation and prosecution, the civilians get access to a more prompt and transparent process of justice. On the other hand, special courts showed to be a failure in the Northern Irish experience; at a bureaucratic level the Diplock Courts were a waste of budget in their creation, taking into account the number of persons that were tried during their existence.<sup>1031</sup> Regarding the respect to human rights, they were the origin of various abuses, as the right to a fair trial and the principle of proportionality were violated.<sup>1032</sup> In the case of the military justice system in Mexico, the prosecutors have gone to the extreme of trying facts that constituted crimes like enforced disappearance as military discipline administrative sanctions.<sup>1033</sup> We can establish that the secrecy and isolation of the military investigations and trials are the main cause of impunity, so a public criminal justice system like the civilian one is an adequate option for any cases in which a military is being suspects of a crime.

The other main point is the creation of two institutional figures: one that is accountable before the federal congress, and another one that works as a civilian organism to which the first figure would also be accountable. The creation of this first figure can adopt the most important elements of the German Parliamentary Commissioner for the Armed Forces.<sup>1034</sup> This figure, which could be called the Federal Congress Commissioner for the Armed Forces, would serve as a linkage

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<sup>1031</sup> G Hogan, C Walker, *Political Violence and the Law in Ireland* (Manchester University Press, Manchester 1989) 238-239

<sup>1032</sup> P Hillyard (n 761) 199-200

<sup>1033</sup> Military personnel that have been prosecuted and sentenced (*National Defence Secretary*)

<[http://www.gob.mx/cms/uploads/attachment/file/59115/Personal\\_Militar\\_Procesado\\_y\\_Sentenciado\\_24\\_Feb.\\_2016.pdf](http://www.gob.mx/cms/uploads/attachment/file/59115/Personal_Militar_Procesado_y_Sentenciado_24_Feb._2016.pdf)> accessed 12 May 2016

<sup>1034</sup> Act on the Parliamentary Commissioner for the Armed Forces (n 571)

between military personnel and the State, but also civil society, as he would also work in cooperation with the civilian organism, which would be discussed in the next paragraph. The commissioner for the armed forces would also cooperate with the President of the Human Rights National Commission in order to discuss complaints of human rights abuses where civilians are involved, as currently the president does not have any legal attributions regarding the armed forces, and neither does he have a close relationship with them.

This second figure is important due to the social context in Mexico: the alarming levels of corruption in the Mexican political class make it essential to give powers of vote and recommendations, in any military matter and decision regarding the security of the nation, to a civilian staff composed by representatives of all social groups and NGOs. This would allow civilian representatives who are not part of the political establishment to be in direct contact with the commissioner for the armed forces, and take joint decisions with the legislative. The experience in Northern Ireland also proved that when a civilian assembly is formed to discuss a security issue, they are much more punctual in finding solutions for society as a whole, especially when it comes to discussing human rights abuses, as they can gather evidence from diverse social groups to analyse and propose recommendations like the Northern Irish assembly did.<sup>1035</sup> This would generate a closer institutional relation between civilians and the armed forces, which would also contribute to have a better cooperation with the State powers (executive, legislative and judicial) in all the matters regarding the use of the military, both at international and domestic levels.

In terms of theoretical legal reforms, this research considers that the most recent reform of constitutional article 29 has great value in terms of international accountability, as one of the principles that guides the reform is *publicity*, which the legislative established as the duty of the State to notify the relevant international organisations about the cases that generated the restriction or suspension of rights and guarantees, the length of the emergency provisions and the legal provisions that will be modified.<sup>1036</sup> While this provision opens the door to make the State liable in case that this provision is breached, the degree of details about the potential emergency regime that the State is required to submit internationally would depend

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<sup>1035</sup> Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland* (Her Majesty's Stationery Office, Norwich 1999)

<sup>1036</sup> Governance and Human Rights United Commissions (n 346) 30

on their political will. For this reason, a federal congress commissioner for the armed forces and a civilian staff in charge of monitoring and voting military matters are fundamental, as being so close to both the military and the members of the legislative would give them access to files and details that would be extremely difficult for international organisations to access. This answers the research question that addressed the need for institutional reforms that would improve civil-military relations in Mexico.<sup>1037</sup>

The current deployment of the armed forces inside Mexico also needs to be regulated as part of an emergency regime, as they are currently operating in a legal loophole. This creates various legal and social issues: there are no legal frameworks for making the State and the military commanders accountable for acts committed by their personnel, and the legislators have not been able to establish limits and guidelines for the use of the army in their current status. If the militarization of the security strategy against organised crime becomes part of a set of emergency provisions, then the State would be accountable internationally for the cases of human rights violations done as consequence of the security operatives, especially the cases that involved the murder of civilians or their torture, as international courts have established the *jus cogens* character of their prohibition and have also attributed liability to States for not investigating, prosecuting and punishing individuals accused of these crimes.<sup>1038</sup> The proposed figures of the commissioner and the civilian staff would play a relevant role here, as they would be in charge of investigating and defending the interests of the parts each one would represent. Apart from the establishment of the current military deployment as part of an emergency regime, there is another essential reform to make: the development of a clear and defined set of constitutional provisions that regulates and serves as a guideline for the use of the army in emergency regimes. The existence of clearly defined limits and attributions in the German Basic Law strengthens the civil State and helps to moderate the natural tensions<sup>1039</sup> between certain civilians and the army. To end the topic of constitutional provisions for the role of the army in an emergency regime, the comparison between the powers of the legislative in Germany and Mexico in their powers over the armed forces showed that the

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<sup>1037</sup> Which should be the main aspects at both legal and institutional levels that would allow a proper accountability system for commands and soldiers in Mexico?

<sup>1038</sup> *Prosecutor v Anto Furundzija* (Judgement) ICTY-95-17/1-T (10 December 1998) [155]

<sup>1039</sup> D Avant (404)



command that the Mexican president has over the armed forces in order to “preserve internal security”<sup>1040</sup> has to be derogated in order to distribute this faculty between the legislative and the two figures already discussed: the commissioner and the civilian staff. Finally, as Baker has established,<sup>1041</sup> the agency theory developed by Feaver can be applied successfully in countries with developing democracies, as the civil State will always be a counterweight for the armed forces, as long as its heads are not a façade of the army. The first step for achieving a stronger mechanism of control must be to name a civilian as the head of the National Defence Secretary. This part of the research gives an answer to the research’s question that addressed the legitimacy of the military deployment in Mexico.<sup>1042</sup>

This research has established the level of dissatisfaction that Mexican military personnel have at the moment;<sup>1043</sup> the experience in Northern Ireland showed that the soldiers find a lot of abandonment and frustration in their daily duties when they have the feeling that they are being institutionally isolated from the civil State.<sup>1044</sup> As the German *Innere Führung* establishes, the soldier has been politicised, not to actively engage in the political system, but to understand tradition and evaluate current political events as part of facing Germany’s past.<sup>1045</sup> If the soldiers in Mexico had a close relationship, not only of control but on their daily-basis duties, following the *agency* model of civil-military relations,<sup>1046</sup> it would be highly beneficial for their understanding of the social background and context of their current duties, as they would have a vast understanding of current domestic political events. Having a politicised army with strong civilian control and an effective independence from political interests increases its relationship and harmony with civil society. Currently the Mexican military does not have adequate training that would allow a democratic military culture, but neither does it possess any efficient

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<sup>1040</sup> Political Constitution of the United Mexican States 2016 (MEX) art 89-VI

<sup>1041</sup> D-P Baker (n 402) 132

<sup>1042</sup> *Which are the current failures in the legal ground for the legitimacy of the Mexican army’s deployment?*

<sup>1043</sup> Ai Camp (n 409) 486

<sup>1044</sup> M Arthur, *Northern Ireland: Soldiers Talking* (Sidgwick & Jackson, London 1987) 80

<sup>1045</sup> *Innere Führung* (n 544) preface 5

<sup>1046</sup> PD Feaver (n 386) 2

channels to lodge complaints when their own human rights are violated. As the IACtHR has established, the Military Justice Code of 2014 did open a legal path for civilian jurisdiction to try military personnel when a civilian is involved in a case of human rights abuses; but a legal model that would enable soldiers to be tried under civilian laws in case that their own human rights are violated, either by other military or a civilian, has not been established.<sup>1047</sup> It can be concluded that article 57 of the Military Justice Code must also include the faculty of civilian jurisdiction for lodging complaints, investigating and prosecuting not only cases where the own soldiers' human rights abuses have been violated, but of any case in which a provision featured in the federal criminal code is breached. Military prosecutors and courts should only be left for the breaching of laws of strict military nature. This would strengthen and provide a reliable legal system of accountability for the military, not only to protect civilians, but also for the protection of the soldiers' own rights. This is an essential legal reform that would improve the strength of legal accountability for the armed forces.<sup>1048</sup>

Regarding the performance of the judicial branch protecting human rights, it is important to address that in States that have enforced measures that have violated human rights, the judges have fallen into behaviours that have permitted the implementation of such policies. This is a problem that appears when the judiciary has in its hands the legality of issues that might compromise national security, and where the *political*<sup>1049</sup> weight of a situation might be revealed to be heavier than the rule of law.<sup>1050</sup> This in turn, creates a "relaxed"<sup>1051</sup> approach while protecting rights. This is in fact a cause of concern when faith is placed in the judicial system in a time of emergency, but the reforms that this research proposes do not increase the vulnerability of the State, *au contraire*, they would confer more legitimacy to the actions of the government. Stronger enforcement against agents of

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<sup>1047</sup> *Radilla Pacheco, Fernandez Ortega and others, and Rosendo Cantu and other v Mexico* (Supervision of fulfilment of sentence 17 April 2015) 5

<sup>1048</sup> *Which should be the main aspects at both legal and institutional levels that would allow a proper accountability system for commands and soldiers in Mexico?*

<sup>1049</sup> C Schmitt, *The Concept of the Political* (George Schwab, tr, Rutgers University Press, New Jersey 1976)

<sup>1050</sup> D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge 2006) 34

<sup>1051</sup> E A Posner, A Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press, New York 2007) 218

the State is not proposed, but the intention is to provide a minimum of access to justice to the victims and their relatives. This would reinforce the state of law and would grant more legitimacy to the armed forces in their tasks against organised crime. National security is not jeopardised by the strengthening of military and judicial institutions.

Even more, there is evidence of judges behaving independently even in the face of national security concerns post-9/11 (the *Belmarsh* case<sup>1052</sup> of the US Supreme Court approach to Guantanamo Bay<sup>1053</sup>). These are indicators that the judicial system is indeed capable of protecting individual rights in cases that involve national security matters. The most important issue for guaranteeing an individual justice system is the protection of judges and other judicial personnel, which would also ensure the principle of *effectiveness* in courts.<sup>1054</sup> This is a matter that the Mexican system also needs to address as soon as possible. A State that guarantees healthy independence to its judiciary power, also contributes in strengthening fundamental rights for all their citizens, as the courts are for the contribution in promoting democracy and creating a better relationship between civil society and the State.<sup>1055</sup>

The current secondary regulations of the military in Mexico also have increased the lack of trust between civil society and military personnel. As this research established, using words like “privilege” to describe the moral status of being part of the Federal Public Administration<sup>1056</sup> does not allow the common citizen and the soldier to feel as having the same rights and obligations. This factor was also a consequence of the prevailing culture of the federal public servants (being elite members) that has been encouraged since the creation of the modern

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<sup>1052</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56

<sup>1053</sup> *Boumediene v. Bush* 553 US 723 (2008)

<sup>1054</sup> K Lenaerts, “Effective Judicial Protection in the EU” (*Assises de la justice* conference November 2013) <<http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf>> accessed 28 December 2016

<sup>1055</sup> F Abul-Ethem, “The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective” (2002) *Fordham International Law Journal* 26, 761, 767, 770

<sup>1056</sup> Code of Conduct for the Public Servants of the Mexican Army and Aerial Force 2008 (MEX), principle 8

Mexican State, as the system allowed the existence of “officer-politicians”.<sup>1057</sup> It is concluded that the National Defence Secretary position should not be given to an active military commander anymore, as the army would benefit from a civilian control which would integrate them more with the “mobilised citizens”<sup>1058</sup> that would form part of the new institutional figures suggested. Both the Federal Congress Commissioner for the Armed Forces and the civilian staff would be able to develop stronger ties with the armed forces as an institution. Plus, the German comparison showed that if the legislative has a stronger control over the army, the executive power cannot exercise hierarchical decisions as the current provisions in Mexico, where the president can exercise a strong power over the National Defence Secretary. As long as the line between being active in the military and engaging in political duties is not clearly limited, the military personnel will have a sense of superiority among society. It is urgent for militarism in Mexico to go through a deep process of reforms that would confer the armed forces the same status as a civilian. This is where the “citizen in uniform” concept and the *Innere Führung* code fit into the picture; chapter 2 paragraphs 201 establishes as its principal goal to “ease the tensions arising from the rights and liberties of the citizen on the one hand and military duty on the other”.<sup>1059</sup> It can be seen that the German code has as its main objective the creation of a relationship based on the understanding and mutual cooperation between the civilians and the soldiers, everything under the assumption that both have the same rights and obligations.

Another of the main legal figures that are incompatible with contemporary human rights standards is *arraigo*. The act of detaining a person for a large number of days proved to be a failure in Northern Ireland when *internment* was introduced. *Arraigo* was reformed in 2008, and in just two years there were already approximately 120 complaints of abuse from the authorities regarding the use of such figure. This figure must be derogated and the federal investigators should continue using the established limits for the number of hours of arrest that are stated in the constitution (48 hours to determine if the suspect’s investigation should be sent to a judge in order to try him, or if he should be set free). It is safe to establish that the Mexican military and federal criminal legislation is still not

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<sup>1057</sup> AG Lopez Montiel (n 434)

<sup>1058</sup> MV Tushnet (n 311)

<sup>1059</sup> *Innere Führung* (n 544) [201]

satisfactorily harmonised with contemporary international standards, answering one of this research's questions.<sup>1060</sup>

Regarding the use of force, the question of the possibility of the military commanders to be subjected to an investigation for the possible commission of Crimes against Humanity should be addressed. The existence of elements that could lead to an investigation are certainly present, as the former Defence Secretary Guillermo Galvan Galvan officially declared that the fatalities of innocents were "collateral damage" resulting from the clash between the armed forces and the drug cartels.<sup>1061</sup> This would imply that the official strategy does not have civilians as its main target, but the strategy nonetheless is completely aware of the deaths of innocents as a side-consequence. Recently, the current federal administration has been the object of controversy for the recent massacres in which armed personnel are allegedly involved. In the Tlatlaya events, the official orders to the soldiers did specify performing direct attacks on suspects as part of a strategy.<sup>1062</sup> It can be argued that this policy targets civilians as part of an official strategy; a circumstance that would constitute a crime against humanity. Therefore, the International Humanitarian Law mechanisms of investigations must attract this case, and enquire about other possible troop divisions in which similar kinds of order could have been given. The Northern Irish experience was the subject of essential judgements which established the severe violations committed as collateral damage of the emergency provisions. Finally, the need for International Humanitarian Law (IHL) to intervene in the Mexican conflict is another fundamental point of this research. As Lawland established,<sup>1063</sup> there are two requirements for the intervention of IHL in a domestic conflict, which the situation in Mexico fulfils. It can be established that the lack of a proper system of accountability for the armed forces came from allowing their indefinite deployment without making this policy a part of a proper state of emergency.

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<sup>1060</sup> *Is the current military Mexican legislation on par with contemporary international human rights legal frameworks and international humanitarian law standards?*

<sup>1061</sup> V. Ballinas, "Deaths of civilians in combat against crime, "collateral damages"" *La Jornada* (Mexico City 13 April 2010)  
<<http://www.jornada.unam.mx/2010/04/13/politica/005n1pol>> accessed 15 February 2014

<sup>1062</sup> Miguel Agustin Pro Juarez Human Rights Centre (n 993) 20

<sup>1063</sup> "Internal conflicts or other situation of violence – what is the difference for victims?" (*ICRC Resource Centre* October)  
<<http://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>> accessed 2 July 2013

## What is the original contribution and impact of this research?

The negative consequences of current civil-military relations in Mexico have been constantly neglected by the State. A large percentage of the Mexican population still agrees the current deployment of the army<sup>1064</sup> and is unaware of the high number of reports about human rights abuses at their hands. The left-wing opposition parties have established these facts in the past,<sup>1065</sup> and have also identified the main flaws of the army, but no studies or comparisons with societies that have had similar conflicts in the past have been developed before this project. Current president Peña Nieto has not made any reforms in the strategy that Calderon started, so it seems that the current political establishment has no will to develop a legal study like the one this research has produced across its chapters, which has its central point in the institutional comparison with Germany and the legal comparison with Northern Ireland. Both comparisons had satisfactory outcomes, which provided an answer to the research question<sup>1066</sup> that enquired the election of Germany and Northern Ireland as subjects of comparison.

The importance of this comparison resides in the fact that no similar study has been done before in order to compare the Mexican current issue in a context upon similar conflicts -regarding the State and non-State actors in a domestic conflict-. The impact of this study can reach beyond the academic level and have an impact in potential reforms through the federal congress, as the theoretical ground for the development of new institutions and legal changes is set in these pages.

Regarding the research methodology used for the legal and institutional comparisons, *Refined Positivism*, as defined by Zirk-Sadowski and Van Hoecke, allowed to take into account elements such as the social context of the different countries studied when comparing legal frameworks and institutions.<sup>1067</sup> By its part, using Zweigert and Kötz's *microcomparison* allowed the comparison of certain parts

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<sup>1064</sup> "National Survey on Victimization and Perception of Public Safety (ENVIPE) 2015" (*Inegi*) p. 46  
<[http://www.inegi.org.mx/est/contenidos/proyectos/encuestas/hogares/regulares/envipe/envipe2015/doc/envipe2015\\_presentacion\\_english.pdf](http://www.inegi.org.mx/est/contenidos/proyectos/encuestas/hogares/regulares/envipe/envipe2015/doc/envipe2015_presentacion_english.pdf)> accessed 5 June 2016

<sup>1065</sup> VL Unzueta Reyes "Civil-military relations: the pending reform" (*Diputados PRD*) 8  
<[http://www.diputadosprd.org.mx/debate\\_parlamentario/articulos/LXI\\_2010\\_6\\_16.pdf](http://www.diputadosprd.org.mx/debate_parlamentario/articulos/LXI_2010_6_16.pdf)> accessed 06 February 2013

<sup>1066</sup> *Can Germany and Northern Ireland be the models for a comparative study with Mexico, in order to reform the military institutions and civil-military relations of this last one?*

<sup>1067</sup> M. Zirk-Sadowski (n 27) 166

of a legal system without comparing the systems as a whole, selecting the relevant elements to the conflict that gave birth to this research.<sup>1068</sup> Locating the *functionality*, as defined by Hofstede, of the concepts analysed allowed identifying the parts that would have a coherent application in Mexico; which proves that the development of the comparison in this research constitutes a type of study that has not been applied before to the civil-militaries conflict in this Latin American country. While it might seem that an armed conflict cannot be compared with others with a different cultural background and geopolitical location, a methodology which takes the social context into account has been adequate to fulfil this study. One of the main aims of this research is to establish that Mexico's conflict can indeed be compared with similar events, even if the political and social context is different, because as it has been established previously, key methodology has been selected for this goal. The suggestions that arose from the comparison are functional and applicable in the Mexican legal and institutional systems. All the points established in these conclusions provide an answer to the question that gave birth to this research: *What kind of structures and mechanisms can be developed to solve the current crisis regarding civil-military relations in Mexico?*

Finally, we can conclude by stating that a severe crisis is also an opportunity to create deep reforms which can have qualitative changes in the legal and political life of a society living amid turmoil. The consequences of the civil-military crisis that Mexico is suffering at the moment should be used as the platform for a constitutional and political renovation concerning the military culture of the Aztec nation. The victims deserve proper access to justice and the armed forces must dignify their profession through democratic mechanisms; once the first steps are done, a harmonic relation will provide the necessary strength and the ethical stand to face the common enemies: organised crime and political corruption.

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<sup>1068</sup> M. Van Hoecke (n 28) 167

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